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THIS SUPPLEMENT CONTAINS

Statutes:

All laws specifically codified by the General Assembly of the State of Georgia through the 2013 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to LexisNexis® through March 29, 2013. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through March 29, 2013.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2013 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2013 supplement pamphlets and in the bound volumes of the Code.

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TITLE 51

TORTS

Chap.

Cross references. — Limited liability for pick-your-own farm operations, T. 2, C. 14, A. 7.

Law reviews. — For annual survey article on tort law, see 52 Mercer L. Rev. 421 (2000). For article, "Defense Against Outrage and the Perils of Parasitic Torts," see 45 Ga. L. Rev. 107 (2010).

For note, "Out With the Old: Georgia Struggles With Its Dated Approach to the Tort of Negligent Infliction of Emotional Distress," see 34 Ga. L. Rev. 349 (1999). For note, "Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s," see 34 Ga. L. Rev. 1049 (2000).

CHAPTER 1

GENERAL PROVISIONS

Sec.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Liability for Abusive Language, 16 POF2d 493.

Public Authority's Failure to Remove or Guard Against Ice or Snow on Surface of Highway or Street, 21 POF2d 251.

Insurer's Liability for Emotional Distress, 32 POF2d 99.

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Debt Collection — Intentional Infliction of Emotional Distress, 47 POF2d 357.

Emotional Distress by Schoolteacher or Administrator, 18 POF3d 103.

Emotional Distress Caused by Fear of Future Disease, 24 POF3d 273.

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Governmental Liability for Failure to Maintain Trees Near Public Way, 41 POF3d 109.

Governmental Liability for Injury to Landowner's Property from Road Construction Activities on Neighboring Land, 65 POF3d 311.

Media Outrage, 68 POF3d 179.

Proof of Roadside Hazard Case, 71 POF3d 1.

Am. Jur. Trials. — Light Aircraft Accident Litigation, 13 Am. Jur. Trials 557.

Helicopter Accident Litigation, 22 Am. Jur. Trials 517.

Midair Breakup of V-Tail Bonanza Aircraft, 33 Am. Jur. Trials 561.

Malfunction and Loss of Spacecraft, 43 Am. Jur. Trials 293.

Civil Consequences of Criminal Conduct, 51 Am. Jur. Trials 337.

Deep Vein Thrombosis and Air Travel, 95 Am. Jur. Trials 1.

51-1-1. Tort defined.

Law reviews. — For annual survey of tort law, see 57 Mercer L. Rev. 363 (2005).

JUDICIAL DECISIONS

Analysis

General Consideration

Violation of duty required.

When an auctioneer sought damages from the auction company the auctioneer worked for and its principal because the auctioneer was arrested in another state for contracting and advertising for an auction without a license, the auction company and principal were entitled to summary judgment because the auctioneer did not show the auction company or principal violated any duty they owed the auctioneer which caused the auctioneer's injury, as the auctioneer knew, when the auctioneer advertised and contracted for the auction in the other state; further, the auction company did not have a license to conduct an auction in that state, so the auctioneer did not establish the elements necessary to recover for the auction company's or principal's alleged tortious conduct under O.C.G.A. § 51-1-1. Morris v. Gavin, Inc., 268 Ga. App. 771, 603 S.E.2d 1 (2004).

Bank's alleged actions in paying a check over a forged endorsement, depositing the funds in new accounts, and failing to observe reasonable commercial standards, were not violations of any legal right of, or duty owed to, the payee of the check who had never received delivery of the check, and the payee had suffered no damages from these actions. Thus, the actions did not give rise to a tort claim under O.C.G.A. §§ 51-1-1, 51-1-6, or 51-1-8. Jenkins v. Wachovia Bank, Nat'l Ass'n, 309 Ga. App. 562, 711 S.E.2d 80 (2011).

City's distribution of federal HUD money. — Since the city's financing activity in distributing federal HUD money did not extend beyond that of a conventional construction financing authority, the court did not err in granting summary judgment to the city in an action for damages arising from an incomplete and defective renovation construction to his home under a home improvement grant. White v. City of Atlanta, 248 Ga. App. 75, 545 S.E.2d 625 (2001).

Cited in Ga. Farm Bureau Mut. Ins. Co. v. Croley, 263 Ga. App. 659, 588 S.E.2d 840 (2003); Brookview Holdings, LLC v. Suarez, 285 Ga. App. 90, 645 S.E.2d 559 (2007).

Torts Related to Contract

Duty must be imposed by law.

Appellate court rejected an insurer's assertion that its insured's individual tort claims failed because a tort was the unlawful violation of a private legal right other than a mere breach of contract, express or implied, as the duties the insured alleged that the insurer violated did not arise merely from contract but were also imposed by O.C.G.A. § 33-31-9. J.M.I.C. Life Ins. Co. v. Toole, 280 Ga. App. 372, 634 S.E.2d 123 (2006).

Tort claim encompassed by breach of contract claim. — In a case in which a car buyer appealed a district court's entry of summary judgment in favor of the lender because the buyer's theft claim was encompassed by the buyer's breach-of-contract claim, it was unnecessary to address whether the buyer had a cause of action under tort law. O.C.G.A. § 51-1-1 provided that a tort was the unlawful violation of a private legal duty other than a mere breach of contract, express or implied. Goia v. Citifinancial Auto, No. 12-12639, 2012 U.S. App. LEXIS 24825 (11th Cir. Dec. 3, 2012) (Unpublished).

Mere nonfeasance of duty insufficient.

Trial court erred in granting the defendants' joint motion for judgment on the pleadings as a chief executive officer (CEO) set forth a breach of fiduciary duty claim because, although a majority owner of an employer could terminate the CEO's contract without cause, the founders of the employer were bound by an employment contract, which purported to establish a confidential relationship. Tidikis v. Network for Med. Communs. & Research,

LLC, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

Claim was not for breach of contract, but for intention never to pay. — Fraud claim survived summary judgment because there was sufficient evidence that the corporation promised the plaintiff a substantial sum if a certain manufacturer began to factory fill a line of vehicles with the corporation's synthetic oil, that it was reasonable to rely on that promise, and that it could be inferred that the corporation never had any intention to "work out" the compensation plan. Morrison v. Exxonmobil Corp. Constr. Millwright, Inc., No. 1:03-CV-140(WLS), 2005 U.S. Dist. LEXIS 36117 (M.D. Ga. Sept. 28, 2005).

Claim was not for breach of contract, but for fraud and breach of fiduciary duty. — In a breach of fiduciary duty and fraud action, whether the jury verdict winner, an investment company, was a party to the three contracts that kickbacks were paid under was not relevant to the contract's claims for breach of fiduciary duty and fraud because those claims were in tort, not contract. Wright v. Apt. Inv. & Mgmt. Co., 315 Ga. App. 587, 726 S.E.2d 779 (2012).

Unjust enrichment claim not a tort. — Trial court properly granted a judgment on the pleadings for a limited liability company, its founders, and a corporation as a president was attempting to treat an unjust enrichment claim like a tort; a claim for unjust enrichment was not a tort, but an alternative theory of recovery if a contract claim failed, and the parties had a contract and the unjust enrichment claim failed as a matter of law. Tidikis v. Network for Med. Communs. & Research, LLC, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

Trial court properly entered judgment on the pleadings for a majority owner of an employer on a chief executive officer's tortious interference with an employment contract claim as the owner had a financial interest in the employer, which was a party to the contract. Tidikis v. Network for Med. Communs. & Research, LLC, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

Trial court properly entered judgment on the pleadings for a majority owner of an employer on a tortious interference with prospective employment claim brought by a chief executive officer (CEO) as there was no evidence that the CEO had an employment offer from a corporation; the claim was predicated on the CEO's termination by the employer and the owner was not a stranger to the employment contract. Tidikis v. Network for Med. Communs. & Research, LLC, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

RESEARCH REFERENCES

ALR. — Negligent spoliation of evidence, interfering with prospective civil action, as actionable, 101 ALR5th 61.

51-1-2. Ordinary diligence and ordinary negligence defined.

JUDICIAL DECISIONS

Analysis

General Consideration

Affirmative defense of assumption of risk bars the plaintiff from recovering on a negligence claim if it is established that the plaintiff, without coercion of circumstances, chooses a course of action with full knowledge of its danger and while exercising a free choice as to whether to engage in the act or not; a defendant asserting an assumption of the risk defense must establish that the plaintiff: (1) had actual knowledge of the danger; (2) understood and appreciated the risks associated with such danger; and (3) voluntarily exposed oneself to those risks. Sones v. Real Estate Dev. Group, Inc., 270 Ga. App. 507, 606 S.E.2d 687 (2004).

Cited in Rosenfeld v. Rosenfeld, 286 Ga. App. 61, 648 S.E.2d 399 (2007).

Applicability to Specific Cases

1. Automobiles

Following too closely. — Summary judgment for driver one was affirmed as even though driver one pled guilty to following too closely, causation was not established since after the self-contradictory portions of an affidavit by a passenger in a car driven by driver two were eliminated, the evidence only showed that there was a series of collisions and that driver one caused one of them because: (1) driver two testified that numerous collisions occurred behind driver two's car before it was struck and driver two did not know who caused the collision; (2) after the contradictory portions of the passenger's affidavit were eliminated, the passenger was also unable to testify about who caused the collision; (3) two other drivers did not testify that driver one's actions caused any injury to the passenger, driver two, or a second passenger in driver two's car; and (4) driver one's testimony that driver one did not cause any car to collide with driver two's car was not contradicted. Hudson v. Swain, 282 Ga. App. 718, 639 S.E.2d 319 (2006).

Negligent entrustment.

Trial court properly entered summary judgment for a mother on an injured party's negligent entrustment claim because: (1) the mother knew about the son's prior collisions and about two arrests for underage drinking, but did not recall the son undergoing any alcohol or drug counseling; (2) the mother knew that the son drank in excess; and (3) there was evidence that the mother knew the son had been caught by the father after drinking and driving. Danforth v. Bulman, 276 Ga. App. 531, 623 S.E.2d 732 (2005).

2. Contractors

Nuisance per se.

Contractors were not liable for the negligent design of a ramp as the Georgia Department of Transportation (DOT) had responsibility for the design of the ramp, despite the facts that the DOT gave the contractors no drawings, that the contractors made suggestions for changes to the ramp, and that the contractors implemented the DOT's design; there was no evidence that the DOT relinquished control of the design to the contractors or that the contract specified that the design of the ramp was the contractors' responsibility. Fraker v. C.W. Matthews Contr. Co., 272 Ga. App. 807, 614 S.E.2d 94 (2005), aff'd, 2007 U.S. App. LEXIS 28793 (11th Cir. 2007).

Contractors were not liable for the negligently controlling traffic as the Georgia Department of Transportation (DOT) was required to place and maintain, or cause to be placed and maintained, traffic control devices and the DOT was responsible for approving all traffic control plans before implementation by a contractor; the injured party failed to show that the contractor failed to implement the traffic control devices pursuant to the DOT's directives, even though the injured party's accident reconstruction expert and drivers involved in the accident found the traffic control measures inadequate or improper. Fraker v. C.W. Matthews Contr. Co., 272 Ga. App. 807, 614 S.E.2d 94 (2005), aff'd, 2007 U.S. App. LEXIS 28793 (11th Cir. 2007).

Work on a public road. — Trial court did not err in sua sponte granting summary judgment to two contractors on an injured party's allegations of negligent inspection of the roadway, negligent maintenance of the roadway, and negligent work performance by the worksite traffic

control supervisor; the injured party had an opportunity to respond to the contractors' claims that they could not be held liable for the injuries as they had performed the work, in a non-negligent manner, pursuant to the Georgia Department of Transportation's specifications. Fraker v. C.W. Matthews Contr. Co., 272 Ga. App. 807, 614 S.E.2d 94 (2005), aff'd, 2007 U.S. App. LEXIS 28793 (11th Cir. 2007).

Pest control company. — Summary judgment for a pest control company was affirmed as although a guest allegedly bitten by a poisonous spider submitted an expert's affidavit that a pest control company breached its standard of care, the guest failed to show actual causation as the expert's affidavit was based on pure speculation that the guest was bitten by a spider that was in the room when the guest arrived, and the guest acknowledged that the guest and the guest's companion could have been responsible for the spider's entrance into the room. Dew v. Motel Props., Inc., 282 Ga. App. 368, 638 S.E.2d 753 (2006), cert. denied, 2007 Ga. LEXIS 205 (Ga. 2007).

8. Miscellaneous

Forklift. — Summary judgment was properly entered for an individual on an injured party's negligent entrustment claim because: (1) both the individual and the driver believed that the driver was entitled to use the forklift; (2) the individual did not have the right to permit or prohibit the use of the forklift by the driver; (3) there was no evidence that the individual had actual knowledge that the driver was incompetent or had a known habit of recklessness; (4) the individual's use of the forklift was not evidence of the individual's actual knowledge that the driver intended to use the forklift in an unsafe manner; and (5) the injured party could not argue that the individual should have known that the driver would use the forklift in an unsafe way since it was not sufficient for a plaintiff to show constructive knowledge. Webb v. Day, 273 Ga. App. 491, 615 S.E.2d 570 (2005).

Duty to fellow pedestrians. — Where a victim was injured after colliding with a hotel guest when exiting an elevator, the trial court erred in granting summary judgment to the guest, as the guest had a duty to walk in a reasonably prudent manner so as to avoid colliding with and injuring fellow pedestrians in the hotel. Beard v. Audio Visual Servs., 260 Ga. App. 476, 580 S.E.2d 272 (2003).

Employer not liable for injuries at party. — Employer was not liable for the injuries sustained by a former employee in a fight with a co-worker as the employer quickly took steps to diffuse any tension at a party by having an attendee leave the party almost immediately after the employer learned of the exchange of words with the employee and as the two fights occurred well after the conclusion of the party. Snellgrove v. Hyatt Corp., 277 Ga. App. 119, 625 S.E.2d 517 (2006).

Pleading and Practice

Fiduciary and tort duty standards are the same. — There is no meaningful difference between the two standards set forth in O.C.G.A. §§ 14-2-842(a)(2) and 51-1-2. Rosenfeld v. Rosenfeld, 286 Ga. App. 61, 648 S.E.2d 399 (2007), cert. denied, 2007 Ga. LEXIS 613 (Ga. 2007).

Jury Instructions

No charge required where request was withdrawn. — There was no error in a trial court's failure to give jury instructions regarding ordinary negligence claims under O.C.G.A. § 51-1-2 as a patient's widow's counsel had withdrawn the jury instruction on ordinary negligence in order to allow the matter to proceed to consideration by the jury on just the issues of professional negligence in the widow's action, alleging, inter alia, medical malpractice. Sagon v. Peachtree Cardiovascular & Thoracic Surgs., P.A., 297 Ga. App. 379, 677 S.E.2d 351 (2009).

Negligence as Jury Question

Expert opinion not supported by records. — Medical records that provided no information about the patient's second visit to the emergency room, the timing of the discovery of a ruptured appendix, or the exploratory surgery that resulted in an appendectomy were too general to support an expert's conclusion that the doctors' conduct proximately caused the pa-

tient's injuries. Jones v. Orris, 274 Ga. App. 52, 616 S.E.2d 820 (2005).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 17B Am. Jur. Pleading and Practice Forms, Master and Servant, § 440.

51-1-3. Extraordinary diligence and slight negligence defined.

JUDICIAL DECISIONS

A common carrier of passengers for hire is bound to exercise extraordinary care and diligence in transportation of its passengers.

Metropolitan Atlanta Rapid Transit Authority, a common carrier, in exercising extraordinary care, did not have to utilize the most approved pattern of an escalator in use up to the time of an injured party's accident. MARTA v. Rouse, 279 Ga. 311, 612 S.E.2d 308 (2005).

An airport shuttle train or people mover providing free transportation inside the secured area of the airport has the same status of public transportation as escalators and elevators, requiring the exercise of extraordinary diligence in the transportation of passengers. Saltis v. A.B.B. Daimler-Benz Ad Tranz Atlanta, Inc., 243 Ga. App. 603, 533 S.E.2d 772 (2000).

Jury instructions. — Failure to define the term "extraordinary diligence" in an instruction on the law pertaining to the duty a carrier owes to its passengers was not harmful error because the term is comprised of words of ordinary understanding and is self-explanatory. Adams v. Metropolitan Atlanta Rapid Transit Auth., 246 Ga. App. 698, 542 S.E.2d 130 (2000).

Intermediate court erred in overruling Darlington v. Finch, 113 Ga. App. 825 (1966), as a common carrier, in exercising extraordinary care, has to stay informed of safety advances in product design, but is not held to a per se rule that requires it to buy and incorporate those safety advances into previously-purchased, non-defective products; Darlington is reinstated. MARTA v. Rouse, 279 Ga. 311, 612 S.E.2d 308 (2005).

51-1-4. Slight diligence and gross negligence defined.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
GROSS NEGLIGENCE AS JURY QUESTION

General Consideration

No gross negligence by emergency room physician. — A patient sued an emergency room physician for malpractice for failing to diagnose a leg fracture. As the physician sought no orthopedic consult because a radiologist opined that the x-rays showed no serious fracture, the patient could not prove by clear and convincing evidence that the physician acted with gross negligence, as required under O.C.G.A. § 51-1-29.5(c); thus, the physician was entitled to summary judgment. Pottinger v. Smith, 293 Ga. App. 626, 667 S.E.2d 659 (2008).

No evidence from which jury could conclude landowner was grossly negligent in controlled burn. — Landowner was entitled to the protections from liability provided by the Georgia Prescribed Burning Act, O.C.G.A. § 12-6-148, because even assuming there was evidence sufficient to create a jury issue as to

whether the landowner was negligent in some way while starting, controlling, or completing a prescribed burn, there was no evidence from which a jury could reasonably conclude that the landowner failed to exercise slight diligence and was, therefore, grossly negligent; according to the chief ranger with the local office of the forestry service, there was nothing actually physically that a landowner could do to stop a prescribed burn from smoldering or to prevent the resulting smoke, and an expert witness's argument that the landowner should have ignored the ranger's recommendations and should not have conducted the burn in order to ensure that the public would be protected from any possibility that smoke would emanate from the landowner's property clearly undermined the express purposes behind the Act, O.C.G.A. § 12-6-145 et seq. Morgan v. Horton, 308 Ga. App. 192, 707 S.E.2d 144 (2011), cert. denied, No. S11C1028, 2011 Ga. LEXIS 533 (Ga. 2011).

Gross negligence not found. — Pursuant to O.C.G.A. § 51-1-4, no reasonable juror could find that gross negligence occurred regarding reporting or preventing a fire because, although the security guard and defendant homeowners' association may have been "inattentive" in the overseeing and monitoring of the surveillance cameras, their actions did not rise to the level of gross negligence. The primary purpose of monitoring the cameras was to maintain the security of access points and to prevent crime, not to prevent residential fires. Great Northern Ins. Co. v. Ruiz, 688 F. Supp. 2d 1362 (S.D. Ga. 2010).

Cited in Gliemmo v. Cousineau, 287 Ga. 7, 694 S.E.2d 75 (2010).

Gross Negligence as Jury Question

When jury question is presented. When a community service participant was assigned to work for the county sanitation department and was killed after falling from the back of a garbage truck while doing this work, no liability could be assigned for assigning the participant to work for the department, as it was properly authorized to participate in the community service program, but the facts that the participant was not issued safety shoes issued to department employees and was told to ride on the back of the truck, even though it was going over 10 miles per hour on a busy highway, contrary to department policy, created a fact issue as to the county's gross negligence, under O.C.G.A. § 51-1-4, and willful misconduct; therefore, the county was not entitled to summary judgment, under O.C.G.A. § 42-8-71(d). Currid v. DeKalb State Court Prob. Dep't, 274 Ga. App. 704, 618 S.E.2d 621 (2005).

Summary judgment was properly granted in favor of a fitness facility because a decedent who drowned in the facility's pool had signed a valid exculpatory agreement that waived the facility's liability for negligence and the facility's lifeguards had not acted grossly negligently pursuant to O.C.G.A. § 51-1-4 in turning their attention to a maintenance duty because: (1) there were few swimmers in the pool; (2) the decedent was an experienced swimmer who was in training to be a military rescue swimmer; and (3) upon discovering that the decedent was unconscious for three to five minutes, the lifeguards began immediate rescue and resuscitation efforts; further, the facility's failure to follow Red Cross safety standards did not constitute gross negligence because there was no evidence that the facility was required to follow such standards. Flood v. Young Woman's Christian Ass'n of Brunswick, Ga., Inc., 398 F.3d 1261 (11th Cir. 2005).

51-1-5. Meaning of "due care" in reference to child of tender years.

JUDICIAL DECISIONS

Analysis

Child's Negligence as Jury Question

Child's Negligence as Jury Question

Running into the street. — In determining issues of proximate causation, it was for the jury to decide the issue of due care owed as to a nine-year-old child who ran into the street and was hit by a truck. Atlanta Affordable Hous. Fund Ltd. P'ship v. Brown, 253 Ga. App. 286, 558 S.E.2d 827 (2002).

51-1-6. Recovery of damages upon breach of legal duty.

Law reviews. — For article, "Labor and Employment Law," see 53 Mercer L. Rev. 349 (2001). For annual survey on torts, see 64 Mercer L. Rev. 287 (2012).

JUDICIAL DECISIONS

Analysis

General Consideration

Construction with federal law. — Trial court erred in granting judgment on the pleadings to a bank as to a customer's negligence claim because the allegations of the complaint, taken as true, established the elements of negligence; the Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. § 6801(a), imposed a legal duty upon the bank to protect the customer's confidential personal information, and a duty imposed by a federal statute such as the GLBA was a duty imposed by law under O.C.G.A. § 51-1-6. Jenkins v. Wachovia Bank, N.A., 314 Ga. App. 257, 724 S.E.2d 1 (2012).

Statute does not create remedy against grandparents for violation of abandonment statute. — Legislature allowed for contempt, garnishment, and income withholding to enforce child support obligations and did not intend to create additional implied remedies under O.C.G.A. § 51-1-6 for violation of O.C.G.A. § 19-10-1, the child abandonment statute. Therefore, a wife was not entitled to recover damages from her ex-husband's parents for her husband's violation of O.C.G.A. § 19-10-1. Bridges v. Wooten, 305 Ga. App. 682, 700 S.E.2d 678 (2010).

This section is designed to provide a cause of action for the breach of a legal duty where one does not otherwise exist as indicated by the plain language of the statute that it operates where "no cause of action is given in express terms." Cruet v. Emory Univ., 85 F. Supp. 2d 1353 (N.D. Ga. 2000).

OSHA standards as evidence of duty. — OSHA standards for the construction of stairs provided in 29 C.F.R. § 1910.24(f) applied to an office building in which an employee fell. The trial court erred in refusing to charge the jury on these standards because the evidence presented issues for the jury to resolve regarding whether the employer violated the stair safety standards, which were admissible not merely as standards of performance but as evidence of legal duty. Smith v. CSX Transp., Inc., 306 Ga. App. 897, 703 S.E.2d 671 (2010), aff'd 289 Ga. 903, 717 S.E.2d 209 (2011).

No breach of duty found following fire at chicken processing plant. — In a product's liability and negligence action brought following a fire at a chicken processing plant, the trial court erred by denying summary judgment motions by a manufacturer and an insulation services company with regard to the owners' negligence per se claims because the owners failed to establish that a breach of any duty in the Georgia Life Safety Code was the proximate cause of the injury. R & R

Insulation Servs. v. Royal Indem. Co., 307 Ga. App. 419, 705 S.E.2d 223 (2010).

Summary judgment properly denied as to proximate cause. — Summary judgment for town and railway was properly denied as to proximate cause as neither eyewitness of a train-truck accident had a continuous, direct view of the area in which the decedent allegedly did not stop the truck. Town of Register v. Fortner, 274 Ga. App. 586, 618 S.E.2d 26 (2005).

Cited in Sakas v. Settle Down Enters., Inc., 90 F. Supp. 2d 1267 (N.D. Ga. 2000); Project Control Servs., Inc. v. Reynolds, 247 Ga. App. 889, 545 S.E.2d 593 (2001); Draper v. Reynolds, 278 Ga. App. 401, 629 S.E.2d 476 (2006); Ellison v. Southstar Energy Servs., LLC, 298 Ga. App. 170, 679 S.E.2d 750 (2009); Baker v. Harcon, Inc., 303 Ga. App. 749, 694 S.E.2d 673 (2010).

Applicability to Specific Cases

1. Duty of Care Imposed

Hospital's duty to follow bylaws. Summary judgment was granted in favor of a hospital in a doctor's O.C.G.A. § 51-1-6 suit alleging that the hospital breached a legal duty to the doctor because the hospital followed its by-laws in the investigation of the doctor's application for reappointment and the doctor's surgical complications rate. Lee v. Hosp. Auth. of Colquitt County, 353 F. Supp. 2d 1255 (M.D. Ga. 2004).

Doctor was not entitled to recover damages under O.C.G.A. § 51-1-6 because the doctor signed a contract that clearly stated that, at its expiration, the doctor agreed to the removal of the hospital privileges and waived the rights to contest the removal under the hospital's bylaws; the exclusivity contract was not void as against public policy or an illegal restraint of trade because the law allowed the hospital to enforce contracts in order to properly administer the hospital. Whitaker v. Houston County Hosp. Auth., 272 Ga. App. 870, 613 S.E.2d 664 (2005).

Private cause of action recognized for false swearing. — Georgia recognizes a private cause of action under O.C.G.A. § 51-1-6 for a claim of injury due to false swearing. Wilson v. State, 317 Ga. App. 171, 730 S.E.2d 500 (2012).

No duty of care created from Veterans Health Administration handbooks. — The government's motion to dismiss was properly granted in a case brought under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., in which: (1) a podiatrist served a residency program at a Veterans Administration (VA) hospital that lasted two years; (2) then passed a certifying examination, but was denied certification because the second year of residency at the VA hospital had not been accredited by the Council on Podiatric Medical Education; (3) the podiatrist relied on Georgia's negligence per se statute, O.C.G.A. § 51-1-6, to establish the duty element of the podiatrist's negligence; and (4) the podiatrist contended that a Veterans Health Administration Handbook 1122.1 established a legal duty requiring the podiatric residency program director to obtain certification of the VA hospital's podiatric residency program and that the director negligently failed to do so; therefore, they were not the product of procedures which Congress prescribed as necessary prerequisites to giving regulations the binding effect of law. Morris v. United States, No. 1:06-CV-2535-GGB, 2007 U.S. Dist. LEXIS 26708 (N.D. Ga. Apr. 11, 2007).

Injection requested by patient. — Patient did not present any evidence that the dentist had violated any statute, regulation, or ordinance regarding an injection that the dentist provided to the patient, at the patient's request, to numb pain; thus, the trial court did not err in granting partial summary judgment to the dentist, at least regarding the patient's negligence per se claim. Pope v. Davis, 261 Ga. App. 308, 582 S.E.2d 460 (2003).

Code violations capable of having causal connection to injuries. — Trial court erred in granting an adult entertainment club's motion for summary judgment in a dancer's action to recover damages for injuries she sustained when a customer of the club assaulted her in a private room because the dancer fell within the class of persons the DeKalb County, Ga., Code, Art. XII, § 15-402 was intended to protect from exploitation and harm, and the club's code violations were

capable of having a causal connection to the dancer's injuries and damage; that was sufficient to constitute negligence per se. Womack v. Oasis Goodtime Emporium I, Inc., 307 Ga. App. 323, 705 S.E.2d 199 (2010).

Bank did not owe duty to payee of check who never had possession of check. — Bank's alleged actions in paying a check over a forged endorsement, depositing the funds in new accounts, and failing to observe reasonable commercial standards, were not violations of any legal right of, or duty owed to, the payee of the check who had never received delivery of the check, and the payee suffered no damages from these actions. Thus, the actions did not give rise to a tort claim under O.C.G.A. § 51-1-1, O.C.G.A. § 51-1-6, or O.C.G.A. § 51-1-8. Jenkins v. Wachovia Bank, Nat'l Ass'n, 309 Ga. App. 562, 711 S.E.2d 80 (2011).

2. Breach of Legal Duty

Failure to comply with railroad traffic signal zoning ordinance. — An auction company's failure to comply with an ordinance requiring the company to pay for traffic signals at a railroad crossing on the road leading to the company's property gave rise to a claim of negligence per se under O.C.G.A. § 51-1-6; the traffic-related zoning conditions were meant to protect those who were required to negotiate the railroad crossing, and the accident at issue, where a car passing through the crossing was struck by a train, was precisely the type of danger the conditions were intended to guard against. Combs v. Atlanta Auto Auction, Inc., 287 Ga. App. 9, 650 S.E.2d 709 (2007), cert. denied, 2008 Ga. LEXIS 156 (Ga. 2008).

Failure to obtain certificate of occupancy was negligence per se as to employee. — Failure of employer to obtain a certificate of occupancy (COO) before opening a facility in which an employee worked was negligence per se as to the employee but not as to the employee's children, as the law requiring a COO was designed to protect those working or otherwise conducting business in the building; furthermore, there was no causal connection between the failure to obtain a COO and an accident where the car in which the children were riding was struck by a train as the car traveled down the road leading to the facility. Combs v. Atlanta Auto Auction, Inc., 287 Ga. App. 9, 650 S.E.2d 709 (2007), cert. denied, 2008 Ga. LEXIS 156 (Ga. 2008).

Service animal. — Innkeepers breached the legal duties imposed by O.C.G.A. §§ 30-4-2 and 43-21-3 when they prohibited a vision impaired individual and the individual's service dog from staying at their hotel. Accordingly, the individual's proposed amended complaint alleged all the elements necessary for recovery under the theory of negligence per se and O.C.G.A. § 51-1-6. Amick v. BM & KM, Inc., 275 F. Supp. 2d 1378 (N.D. Ga. 2003).

Insurance counselor's duty to be licensed. — Summary judgment was properly entered for a consultant and a consulting firm on a bidding insurer's claim under O.C.G.A. § 51-1-6 after all of the bids for a county contract were rejected because the consultant lacked a license under O.C.G.A. §§ 33-23-1.1 and 33-23-4 as the statutes requiring insurance counselors to be licensed and mandating that licensed individuals meet certain qualifications were designed to protect the insurance counselor's clients and not to protect or benefit providers of insurance; the generic statement that O.C.G.A. § 33-23-5(a) was "for the protection of the people of (Georgia)" did not expand the intent of the statute requiring licensure for counselors to benefit businesses that provided insurance. Benefit Support, Inc. v. Hall County, 281 Ga. App. 825, 637 S.E.2d 763 (2006), cert. denied, No. S07C0306, 2007 Ga. LEXIS 214 (Ga. 2007).

No duty imposed by traffic control device regulation. — Injured motorist failed to prove that highway contractors who built a highway on-ramp were entitled to partial summary judgment as to liability on the motorist's negligence claim because the motorist failed to prove that regulations governing traffic control devices were mandatory and had the force of law, that the motorist was in a protected class, that the harm the motorist suffered was the type of harm the regulations were

intended to guard against, and that the alleged negligence per se proximately caused the motorist's injuries. Hubbard v. DOT, 256 Ga. App. 342, 568 S.E.2d 559 (2002).

No civil duty imposed by criminal statute. — Injured party was not able to recover under O.C.G.A. § 51-1-6 for the declarant's alleged violation the criminal statutes O.C.G.A. § 16-10-26, prohibiting giving a false report of a crime, and O.C.G.A. § 16-10-24, prohibiting obstructing or hindering the police, as these statutes did not provide for a civil cause of action; furthermore, the legislature had provided statutory civil remedies in the form of false arrest under O.C.G.A. § 51-7-1 and malicious prosecution under O.C.G.A. § 51-7-40. Jastram v. Williams, 276 Ga. App. 475, 623 S.E.2d 686 (2005).

Wrongful discharge of servant.

This section did not give an employee a cause of action on the basis that his employer dismissed him because of his "first offender" conviction in violation of § 42-8-63. Mattox v. Yellow Freight Sys., 243 Ga. App. 894, 534 S.E.2d 561 (2000).

Age discrimination. — An at-will employee may not sue in tort under this section or § 51-1-8 for wrongful discharge based upon age discrimination. Reilly v. Alcan Aluminum Corp., 272 Ga. 279, 528 S.E.2d 238 (2000).

The provisions of this section and § 51-1-8 do not create a civil action for age discrimination for an employee-at-will based upon a violation of either § 34-1-2 or the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. Reilly v. Alcan Aluminum Corp., 221 F.3d 1170 (11th Cir. 2000).

Underaged drinking.

O.C.G.A. § 51-1-6 does not establish a cause of action based on the violation of O.C.G.A. § 3-3-23, the underage drinking statute. Lumpkin v. Mellow Mushroom, 256 Ga. App. 83, 567 S.E.2d 728 (2002).

Pleading and Practice

Construction with federal law. — Because an express cause of action already existed as part of a remedial scheme set out by the U.S. Congress under the Vocational Rehabilitation Act (VRA) and the Americans with Disabilities Act (ADA), plaintiff may not recover under this section for any alleged violations of subject legal duties. Cruet v. Emory Univ., 85 F. Supp. 2d 1353 (N.D. Ga. 2000).

Because the breach of legal duty complained of by a title processor against the state vehicle title processing agency employees was under the Americans with Disabilities Act (ADA), the ADA provided a remedial scheme and thus the processor's claim under O.C.G.A. § 51-1-6 was duplicative; O.C.G.A. § 51-1-6 allowed an individual to assert a tort claim for the violation of a legal duty where a cause of action did not otherwise exist. Higdon v. Jackson, 393 F.3d 1211 (11th Cir. 2004).

Pleading violation of statute as negligence per se.

O.C.G.A. § 33-24-44 governed the cancellation of insurance policies but did not govern the termination of insurance agents which may have had the ancillary effect of terminating an insurance policy, and the court could not reasonably conclude that the retroactive termination of the financial planner was the harm § 33-24-44 was intended to guard against. Therefore, the financial planner did not allege a viable negligence per se claim and the negligence claims against the insurance company were required to be dismissed. Rosen v. Protective Life Ins. Co., No. 1:09-cv-03620-WSD, 2010 U.S. Dist. LEXIS 50392 (N.D. Ga. May 20, 2010).

Summary judgment erroneously denied. — In a personal injury action alleging violations of the Americans with Disabilities Act (ADA), a trial court erred by denying summary judgment to a county director of public works because the consumer who tripped and fell was not disabled and, therefore, was not within the class of persons protected by the ADA. Newman v. Johnson, 319 Ga. App. 307, 733 S.E.2d 520 (2012).

Failure to exhaust administrative remedies. — Medical group's claim that a health maintenance organization was liable to the group in tort under O.C.G.A. § 51-1-6 based upon the group's breach of a legal duty to comply with Georgia's Any Willing Provider Statute, O.C.G.A. § 33-20-16, was procedurally barred by the failure to exhaust administrative rem-

edies by first submitting the group's dispute to the Georgia Insurance Commissioner pursuant to O.C.G.A. § 33-20-30. Northeast Ga. Cancer Care, LLC v. Blue Cross & Blue Shield of Ga., Inc., 297 Ga. App. 28, 676 S.E.2d 428 (2009), cert. denied, No. S09C1241, 2009 Ga. LEXIS 805 (Ga. 2009).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Intentional Spoliation of Evidence, 18 POF3d 515.

Am. Jur. Trials. — Defense of Claim Brought Under the Americans with Disabilities Act, 49 Am. Jur. Trials 171.

ALR. — Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress — ethnic, racial, or religious harassment or discrimination, 19 ALR6th 1.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress — sexual harassment, sexual discrimination, or accusations concerning sexual conduct or orientation, 20 ALR6th 1.

51-1-8. Right of action arising from breach of private duty.

Law reviews. — For article, "Labor and Employment Law," see 53 Mercer L. Rev. 349 (2001).

JUDICIAL DECISIONS

Analysis

General Consideration

Instruction in exact language of section not required. — Where the trial court fully charged the jury regarding the common-law and statutory duties on which plaintiff based her claims, it was not error for the court to refuse a request to charge the exact language of this section. Wadkins v. Smallwood, 243 Ga. App. 134, 530 S.E.2d 498 (2000).

No liability for no breach of private duty. — In a wrongful death action filed by a decedent-lessee's administrator in which the decedent was killed when crossing a public highway that the lessor did not control, the lessor was properly granted summary judgment, as the administrator failed to show that the lessor was negligent per se or that the lessor breached either a common law or private duty owed to the lessee. Walton v. UCC X, Inc., 282 Ga. App. 847, 640 S.E.2d 325 (2006).

No liability when underlying claims fail. — Because O.C.G.A. § 51-1-8 did not confer a separate cause of action in tort and plaintiff dry cleaners' claims against defendant natural gas supplier thereunder were contingent on the other claims that failed, the claims under § 51-1-8 failed. Byung Ho Cheoun v. Infinite Energy, Inc., No. 09-13902, 2010 U.S. App. LEXIS 1866 (11th Cir. Jan. 27, 2010) (Unpublished).

Cited in Vibratech, Inc. v. Frost, 291 Ga. App. 133, 661 S.E.2d 185 (2008); Ellison v. Southstar Energy Servs., LLC, 298 Ga. App. 170, 679 S.E.2d 750 (2009).

Private Duty Related to Contract

Contract unclear and unenforceable. — In a Chapter 11 bankruptcy proceeding, the debtor had a valid objection

to an allowance of a claim arising from pending state court litigation; an alleged contract was not sufficiently clear to be enforceable, and there was no independent duty arising from the contract such as would give rise to a negligence claim under O.C.G.A. § 51-1-8. In re LJL Truck Ctr., Inc., 299 B.R. 663 (Bankr. M.D. Ga. 2003).

Breach of security contract established. — Summary judgment was properly denied to a trailer park owner in a premises liability action based upon the murder of a tenant in the park since the owner had a duty to provide security to the park as a result of a contract it entered with all residents and failed to inform the residents that security was discontinued. Brookview Holdings, LLC v. Suarez, 285 Ga. App. 90, 645 S.E.2d 559, cert. denied, 285 Ga. App. 90, 645 S.E.2d 559 (2007).

No legal duty to consumer under Franchise Practices Act. — A trial court erred by denying a franchisor's motion for summary judgment with regard to a consumer's negligence claim predicated on the Franchise Practices Act, O.C.G.A. § 10-1-620 et seq., as the Act did not impose a legal duty upon the franchisor to prevent a franchisee from presenting an unreasonable risk of harm to members of the public like the consumer. DaimlerChrysler Motors Co. v. Clemente, 294 Ga. App. 38, 668 S.E.2d 737 (2008).

Applicability to Specific Cases

1. Private Duty Imposed

Funeral homes. — Because the named plaintiffs in a purported class action produced evidence that two named plaintiffs were parties to contracts with the funeral homes, the two named plaintiffs had standing to assert claims of negligence on behalf of the class based on the existence of a contract. In re Tri-State Crematory Litig., 215 F.R.D. 660 (N.D. Ga. 2003).

Bank did not owe duty to payee of check who never had possession of check. — Bank's alleged actions in paying a check over a forged endorsement, depositing the funds in new accounts, and failing to observe reasonable commercial standards, were not violations of any legal right of, or duty owed to, the payee of the check who had never received delivery of the check, and the payee had suffered no damages from these actions. Thus, the payee did not give rise to a tort claim under O.C.G.A. § 51-1-1, O.C.G.A. § 51-1-6, or O.C.G.A. § 51-1-8. Jenkins v. Wachovia Bank, Nat'l Ass'n, 309 Ga. App. 562, 711 S.E.2d 80 (2011).

2. Breach of Private Duty

Age discrimination. — An at-will employee may not sue in tort under § 51-1-6 or this section for wrongful discharge based upon age discrimination. Reilly v. Alcan Aluminum Corp., 272 Ga. 279, 528 S.E.2d 238 (2000).

The provisions of § 51-1-6 and this section do not create a civil action for age discrimination for an employee-at-will based upon a violation of either § 34-1-2 or the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. Reilly v. Alcan Aluminum Corp., 221 F.3d 1170 (11th Cir. 2000).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Negligent Operation of Private Swimming Pool, 38 POF2d 1. Negligent Operation of Pleasure Boat, 43 POF2d 395.

51-1-11. When privity required to support action; product liability action and time limitation therefore; industry-wide liability theories rejected.

(a) Except as otherwise provided in this Code section, no privity is necessary to support a tort action; but, if the tort results from the violation of a duty which is itself the consequence of a contract, the right

of action is confined to the parties and those in privity to that contract, except in cases where the party would have a right of action for the injury done independently of the contract and except as provided in Code Section 11-2-318.

(b)(1) The manufacturer of any personal property sold as new property directly or through a dealer or any other person shall be liable in tort, irrespective of privity, to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained.

(2) No action shall be commenced pursuant to this subsection with respect to an injury after ten years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury.

(3) A manufacturer may not exclude or limit the operation of this subsection.

(c) The limitation of paragraph (2) of subsection (b) of this Code section regarding bringing an action within ten years from the date of the first sale for use or consumption of personal property shall also apply to the commencement of an action claiming negligence of a manufacturer as the basis of liability, except an action seeking to recover from a manufacturer for injuries or damages arising out of the negligence of such manufacturer in manufacturing products which cause a disease or birth defect, or arising out of conduct which manifests a willful, reckless, or wanton disregard for life or property. Nothing contained in this subsection shall relieve a manufacturer from the duty to warn of a danger arising from use of a product once that danger becomes known to the manufacturer.

(d) Irrespective of privity, a manufacturer shall not be held liable for the manufacture of a product alleged to be defective based on theories of market share or enterprise, or other theories of industry-wide liability.

(e) Irrespective of privity, a manufacturer of a product alleged to be defective shall not be held liable for a public nuisance based on theories of market share or enterprise, or other theories of industry-wide liability. (Orig. Code 1863, § 2899; Code 1868, § 2905; Code 1873, § 2956; Code 1882, § 2956; Civil Code 1895, § 3812; Civil Code 1910, § 4408; Code 1933, § 105-106; Ga. L. 1968, p. 1166, § 1; Ga. L. 1978, p. 2202, § 1; Ga. L. 1978, p. 2218, § 1; Ga. L. 1978, p. 2267, § 1; Ga. L. 1987, p. 613, § 1; Ga. L. 2009, p. 625, § 1/SB 213.)

The 2009 amendment, effective May 4, 2009, added subsections (d) and (e). See editor's note for applicability.

Editor's notes. — Ga. L. 2009, p. 625, § 2, not codified by the General Assembly, provides that subsections (d) and (e) shall apply to causes of action arising on or after May 4, 2009.

Law reviews. — For annual survey article on tort law, see 52 Mercer L. Rev. 421 (2000). For survey article on tort law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 425 (2003). For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005). For annual survey of product liability law, see 58 Mercer L. Rev. 313 (2006). For survey article on product liability law, see 59 Mercer L. Rev. 331 (2007). For survey article on product liability law, see 60 Mercer L. Rev. 303 (2008). For annual survey on product liability, see 61 Mercer L. Rev. 267 (2009). For annual survey on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009). For annual survey of law on product liability, see 62 Mercer L. Rev. 243 (2010). For annual survey on product liability, see 64 Mercer L. Rev. 231 (2012).

For note, "Does the National Childhood Vaccine Injury Compensation Act Really Prohibit Design Defect Claims?: Examining Federal Preemption in Light of American Home Products Corp. v. Ferrari," see 26 Ga. St. U.L. Rev. 617 (2010).

JUDICIAL DECISIONS

Analysis

General Consideration

Application of Florida law appropriate. — Florida law was properly applied for a fraud claim brought by a lessee against a lessor's principal because both Georgia under O.C.G.A. § 51-1-11(a) and Florida recognized an exception to the economic loss rule for injuries occurring independently of a contract and thus, the application of Florida law did not contravene Georgia public policy. Luigino's Int'l, Inc. v. Miller, 2009 U.S. App. LEXIS 2614 (11th Cir. Feb. 11, 2009) (Unpublished).

Former O.C.G.A. § 24-9-67 inapplicable. — Trial court was not required to consider a driver's expert affidavits under former O.C.G.A. § 24-9-67 (see now O.C.G.A. § 24-7-707) in a products liability action because by the statute's terms former O.C.G.A. § 24-9-67 (see now O.C.G.A. § 24-7-707) applied to criminal cases, not civil cases. Udoinyion v. Michelin N. Am., Inc., 313 Ga. App. 248, 721 S.E.2d 190 (2011).

Calculating date. — Date to be used for calculating the beginning of the statute of repose under O.C.G.A. § 51-1-11(b)(2), and the conditions precedent for the imposition of strict liability under O.C.G.A. § 51-1-11(b)(1) are not defined in the same terms because O.C.G.A. § 51-1-11(b)(2) refers to the sale of the finished product to the consumer who is intended to receive the product as new. Campbell v. Altec Indus., 288 Ga. 535, 707 S.E.2d 48 (2011).

Cited in Dean v. Toyota Indus. Equip. Mfg., Inc., 246 Ga. App. 255, 540 S.E.2d 233 (2000); Jones v. NordicTrack, Inc., 236 F.3d 658 (11th Cir. 2000); Brookview Hold-

ings, LLC v. Suarez, 285 Ga. App. 90, 645 S.E.2d 559 (2007); Carolina Tobacco Co. v. Baker, 295 Ga. App. 115, 670 S.E.2d 811 (2008); Coosa Valley Tech. College v. West, 299 Ga. App. 171, 682 S.E.2d 187 (2009); Dixie Group, Inc. v. Shaw Indus. Group, 303 Ga. App. 459, 693 S.E.2d 888, cert. denied, No. S10C1241, 2010 Ga. LEXIS 659; cert. denied, No. S10C1302, 2010 Ga. LEXIS 730 (Ga. 2010).

Privity as Element of Action

2. Applicability to Specific Cases

General contractor not in privity with contract between school district and agent. — A general contractor's negligence and breach of duty claims against an agent for a school district were barred by the economic loss rule, O.C.G.A. § 51-1-11(a); the contractor was essentially alleging negligent supervision of a school project, and the contractor was not in privity with the contract between the agent and the school district and did not assert any legal duty owed independently of the contract. J. Kinson Cook of Ga., Inc. v. Heery/Mitchell, 284 Ga. App. 552, 644 S.E.2d 440 (2007).

Surety's recovery from a party not in privity. — As a surety, attempting to recover from a CPM based on a construction company's default, was not in privity with the CPM; did not allege willfulness, physical harm, or property damage; and failed to present exceptions to O.C.G.A. § 51-1-11's strict privity rule other than negligent misrepresentation, personal professional negligence claims failed. Carolina Cas. Ins. Co. v. R.L. Brown & Assocs., No. 1:04-cv-3537-GET, 2006 U.S. Dist. LEXIS 71056 (N.D. Ga. Sept. 29, 2006).

City contractor not in privity with city water customers. — Because the only specific damages alleged by a city's water customers were overpayments to the city for which the customers sought a refund, and because the customers did not seek damages due to injury to the customers' persons or to the customers' real or personal property, the city's contractors did not owe the customers a duty independent of the customers' contracts with the city. City of Atlanta v. Benator, 310 Ga. App. 597, 714 S.E.2d 109 (2011).

Products Liability

1. In General

Expert affidavit inadequate. — Trial court did not err in determining that the affidavits of a driver's experts were inadequate under former O.C.G.A. § 24-9-67.1(b) (see now O.C.G.A. § 24-7-702) to defeat summary judgment in favor of a manufacturer in the driver's products liability action because the affidavits did not describe the facts or data upon which the experts' opinions were based, did not explain the principles or methods the experts used to reach the experts' conclusions about the tire, and did not provide support for a conclusion that the experts had applied those principles and methods reliably in the experts' inspections of the tire. Udoinyion v. Michelin N. Am., Inc., 313 Ga. App. 248, 721 S.E.2d 190 (2011).

Subsection (b), by its specified terms, runs to the benefit of natural persons only.

Strict liability claims under O.C.G.A. § 51-1-11(b)(1) by plaintiff insured, as subrogee of a contractor, against defendants, the seller of a school fire protection system and the designer and manufacturer of the system's controller, failed because the insurer and its insured, as corporations, were not "natural persons" within § 51-1-11(b)(1). ACE Fire Underwriters Ins. Co. v. ALC Controls, Inc., 2008 U.S. Dist. LEXIS 41672 (N.D. Ga. May 27, 2008).

Exception to 10 year liability limit. — As a general rule, tort claims against a manufacturer are barred by O.C.G.A. § 51-1-11(b)(2) after 10 years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury; under O.C.G.A. § 51-1-11(c), however, the legislature crafted an exception to the 10-year limit providing that nothing contained in that subsection shall relieve a manufacturer from the duty to warn of a danger arising from use of a product once that danger becomes known to the manufacturer. Hunter v. Werner Co., 258 Ga. App. 379, 574 S.E.2d 426 (2002).

Plaintiff failed to prove defective product design.

In an action arising from the electrocution of plaintiffs' decedent while decedent was installing a washer/dryer unit in an apartment complex, summary judgment for the seller and manufacturer was proper because there was no evidence that the failure to place a rejection feature in the terminal block to prevent mis-wiring constituted a defective design. Moore v. ECI Mgt., 246 Ga. App. 601, 542 S.E.2d 115 (2000).

3. Definitions

Product. — Engineering company that designed an allegedly defective reinforcing safety net that was installed in the soil above a combined sanitary and storm sewer, and which failed to prevent a hole from developing, could have been found liable under O.C.G.A. § 51-1-11 as the reinforcing safety net could have been considered a product under a theory of products liability. Tensar Earth Techs., Inc. v. City of Atlanta, 267 Ga. App. 45, 598 S.E.2d 815 (2004).

4. Applicability of Subsection (b)

Evidence of wilful, reckless, or wanton conduct.

In the absence of evidence showing that any defendant acted with a willful, reckless or wanton disregard for life or property, the willful misconduct exception to the statute of repose was inapplicable in an action based on the claim that defendants were liable for failing to install an alarm on a truck which would have warned bystanders when the truck was moving backwards. Vickery v. Waste Mgt. of Ga., Inc., 249 Ga. App. 659, 549 S.E.2d 482 (2001).

Manufacturer of automobile. — Vehicle owner's negligent design claim did not fall within the statute of repose exception under O.C.G.A. § 51-1-11(c) because no reasonable trier of fact could have found that the manufacturer's conduct was willful and wanton; the vehicle performed well on tests that were designed to evaluate rollover propensity. Ivy v. Ford Motor Co., 646 F.3d 769 (11th Cir. 2011).

Determining timing of product liability for defective truck lift cylinder. — In order to determine whether product liability claims involving an allegedly defective truck lift cylinder were timely under O.C.G.A. § 51-1-11(b)(2), it was necessary to certify a question to the Georgia Supreme Court as to whether the statute began to run when the lift cylinder was assembled or tested, when the truck was assembled, or when the truck was delivered to the truck's initial purchaser. Campbell v. Altec Indus., 605 F.3d 839 (11th Cir. 2010).

5. Design Defect Cases

Risk-utility analysis.

Parents' wrongful death claim under O.C.G.A. § 19-7-1 pertaining to an unclipped rear seat failed on summary judgment because the unclipped seat did not contribute to their child's fatal skull fracture, and there was thus no evidence showing proximate causation under O.C.G.A. § 51-1-11(b)(1) between the unclipped seat and the child's death; the parents also did not assert a survival action in order to permit recovery for pain and suffering in that such damages were not permitted under O.C.G.A. §§ 19-7-1 and 51-4-1. Davenport v. Ford Motor Co., No. 1:05-cv-3047-WSD, 2007 U.S. Dist. LEXIS 91245 (N.D. Ga. Dec. 11, 2007).

Impossible to determine product liability case. — In this products liability case, summary judgment to defendants was appropriate since: (1) the opinions of plaintiff's experts as to the cause of plaintiff's injuries and the death of plaintiff's daughter were based on speculation, the opinions would not provide an adequate basis to survive summary judgment even if the opinions were admitted into evidence; and (2) other than the expert testimony proffered by plaintiff, there was no evidence in the record that the container on the front porch of the mobile home actually exploded or likely exploded on the day of the accident or, if the container did, that the explosion of the container caused plaintiff's injuries or the death of plaintiff's daughter. Walker v. Blitz United States, Inc., 663 F. Supp. 2d 1344 (N.D. Ga. 2009).

Dealer's liability for a failure to warn. — While O.C.G.A. § 51-1-11(b) limited strict liability in tort for product

design defects to manufacturers, a dealer could be liable for a failure to warn of a car's stability issue or that the car did not have a stability system that the dealer knew had been developed by the car manufacturer to remedy a design defect. Thayer v. GMC, No. 1:05-cv-1889-WSD, 2005 U.S. Dist. LEXIS 36193 (N.D. Ga. Dec. 14, 2005).

Motorcycle helmet. — In the absence of expert testimony that a design defect cause a motorcycle operator's helmet to fog up and that anti-fogging features used in snowmobile helmets could safely be used in street helmets, the operator had no evidence to show that the fogging, which was a common problem in all helmets, was due to a design defect that the helmet manufacturer could have remedied with a feasible alternative design, and thus, the operator's O.C.G.A. § 51-1-11 design defect claim failed; the operator's injury was not a sufficient basis, in and of itself, for concluding that the helmet was defective. Mize v. HJC Corp., No. 1:03-CV-2397-JEC, 2006 U.S. Dist. LEXIS 65180 (N.D. Ga. Sept. 13, 2006).

Summary judgment was properly granted in an O.C.G.A. § 51-1-11(b) products liability case as, while identification of a specific defect was not required, it was not sufficiently shown that a boat's gimbal housing deviated from a properly made housing; the existence of a manufacturing defect was not the only plausible explanation for how the housing broke. Graff v. Baja Marine Corp., 310 Fed. Appx. 298 (11th Cir. 2009) (Unpublished).

Hip prosthesis. — Because the district court excluded an expert's testimony due to unreliability under Daubert and Fed. R. Evid. 702, the court properly granted summary judgment to the manufacturer of an allegedly defective hip prosthesis on all claims, including plaintiffs' strict liability claim. Sumner v. Biomet, Inc., No. 11-10280, 2011 U.S. App. LEXIS 14584 (11th Cir. July 15, 2011) (Unpublished).

Manufacturing defect in medical device. — Because the plaintiff, a surgical patient, did not show that a medical device, a surgical wrap, that was implanted in the plaintiff's stomach did not perform as intended, which required the plaintiff to show how it was intended to function, the plaintiff did not produce evidence, expert or otherwise, from which a reasonable jury could have concluded that the device contained a manufacturing defect to meet the standard set forth in O.C.G.A. § 51-1-11(b)(1), and thus, summary judgment was appropriately granted to the defendant, the manufacturer of the product. Williams v. Mast Biosurgery USA, Inc., 644 F.3d 1312 (11th Cir. 2011).

6. Strict Liability

Summary judgment for defendant improper. — In an action against the manufacturer of a penile implant which had to be surgically removed after an infection developed, the court erred in granting summary judgment to the manufacturer on the plaintiff's claim of strict liability since there was some evidence that the device did not operate as intended and caused the infection which required removal of the implant since the plaintiff's physician's post-operative report noted that there was a disconnection of tubing between the reservoir and cylinder, causing the reservoir fluid to leak into the scrotal compartment, thereby causing infection. Williams v. American Med. Sys., 248 Ga. App. 682, 548 S.E.2d 371 (2001).

Injured party was not required to show the extent of the "enhanced injury" caused by the failure of a seat belt or air bag as the party claimed only that the manufacture of the seat belt and air bag were defective; the injured party did not claim that the design of the seat belt and air bag were defective. Owens v. GMC, 272 Ga. App. 842, 613 S.E.2d 651 (2005).

Failure to identify specific defect was not fatal to claim. — Because plaintiff patient's expert testified that medical device's wires were cut when it was removed in a third surgery, resulting failure to identify a specific defect was not fatal to O.C.G.A. § 51-1-11(b)(1) strict liability claim, and defendant manufacturer's motion for summary judgment was denied. Trickett v. Advanced Neuromodulation Sys., 542 F. Supp. 2d 1338 (S.D. Ga. 2008).

Identity of manufacturer. — Construction worker's O.C.G.A. § 51-1-11(b)(1) strict liability claim against a boom manufacturer failed be-

cause there was no evidence that the manufacturer produced the boom that struck the worker, which the worker had been unable to identify, nor was there any evidence that the boom had a defect or that any such defect was the proximate cause of the worker's injuries. McBride v. JLG Indus., No. 7:03-cv-118(HL), 2005 U.S. Dist. LEXIS 21713 (M.D. Ga. Sept. 20, 2005).

Construction worker's O.C.G.A. § 51-1-11(b)(1) strict liability claim against a boom manufacturer failed because there was no evidence that the manufacturer produced the boom that struck the worker, which the worker had been unable to identify, nor was there any evidence that the boom had a defect or that any such defect was the proximate cause of the worker's injuries. Mosley v. JLG Indus., 2005 U.S. Dist. LEXIS 21782 (M.D. Ga. Sept. 20, 2005).

In a personal injury and products liability action where the seller of an engine had no active participation in the design of an alleged defective wood chipper, and the seller's only input into the design was limited to saying in essence that the particular engine would perform adequately in such a chipper, the trial court properly granted summary judgment to the seller since the seller did not qualify in any manner as a manufacturer of the alleged defective chipper. Davenport v. Cummins Alabama, Inc., 284 Ga. App. 666, 644 S.E.2d 503 (2007).

Strict liability did not attach as defendants did not manufacture chemicals. — Plaintiffs sued the defendants, a chemical plant and a laboratory, alleging the plaintiffs were injured due to chemical fires at the laboratory's facility. As the complaint did not allege that the defendants manufactured the chemicals that caused the harm, the complaint did not state a claim for strict liability under O.C.G.A. § 51-1-11(b)(1), and the defendants were properly granted summary judgment on that claim. Smith v. Chemtura Corp., 297 Ga. App. 287, 676 S.E.2d 756 (2009).

No inadequate warning on mouthwash. — When a consumer alleged that mouthwash caused temporary tooth discoloration and taste impairment, the inadequate warning component of the consumer's strict liability claim failed because the consumer had the opportunity to read the label, but failed to do so. Silverstein v. P&G Mfg. Co., 700 F. Supp. 2d 1312 (S.D. Ga. Oct. 30, 2009).

7. Pleading and Practice

Statute of repose.

Because the statute of repose in O.C.G.A. § 51-1-11(b)(2) had expired when the parents filed their products liability complaint against an automobile manufacturer, and because the parents failed to make the required foundational showing of substantial similarity, the trial court correctly granted summary judgment in favor of the manufacturer because the exception in § 51-1-11(c) did not apply. Parks v. Hyundai Motor Am., Inc., 294 Ga. App. 112, 668 S.E.2d 554 (2008).

Trial court properly applied the Georgia statute of repose pursuant to O.C.G.A. § 51-1-11 rather than the longer statute in Texas in a product liability action as the statute of repose involved remedial rather than substantive rights and under the Georgia choice of law rules, Georgia's procedural and remedial provisions governed the matter; the matter involved a vehicle accident that occurred in Texas, although the action was brought in Georgia. Bagnell v. Ford Motor Co., 297 Ga. App. 835, 678 S.E.2d 489 (2009).

While the original complaint against the car distributor was filed after the expiration of the 10-year statute of repose, which presented an absolute defense to the plaintiffs' claims of strict liability and negligent manufacture and design, the statute of repose did not provide an absolute bar to the plaintiffs' claims for negligent failure to warn against the car manufacturer as O.C.G.A. § 51-1-11(c) removed the negligent failure to warn claims from the ambit of the statute of repose. Parks v. Hyundai Motor Am., Inc., 258 Ga. App. 876, 575 S.E.2d 673 (2002).

Because a power company was the intended consumer of an assembled bucket truck and the truck's component parts, an employee's suit had to be filed against any manufacturer under O.C.G.A. § 51-1-11(b) within ten years of the date of the sale of the finished product to the

power company; the statute of repose found in O.C.G.A. § 51-1-11(b)(2) begins to run when a finished product is sold as new to the intended consumer who is to receive the product. Campbell v. Altec Indus., 288 Ga. 535, 707 S.E.2d 48 (2011).

Applicability of limitation period. Homeowners' suit alleging that three corporations, which provided home security and monitoring services, were strictly liable under O.C.G.A. § 51-1-11 for damages to the homeowners' residence that were caused by fire that was not detected by the homeowners' security system was time-barred under a one-year limitations period in the parties' contract; that period was enforceable because it was not unreasonable and had been agreed to by the homeowners when they entered the contract. Jacobs v. ADT Sec. Servs., No. 4:05-CV-139 (CDL), 2006 U.S. Dist. LEXIS 69103 (M.D. Ga. Sept. 26, 2006).

Plaintiff failed to state claim for strict liability. — Plaintiff's allegations against drug manufacturers failed to state a claim for strict liability under O.C.G.A. § 51-1-11(b) because the plaintiff failed to allege any specific design or manufacturing defect in the products and the court could not draw the reasonable inference that a design or manufacturing defect caused the decedent's injuries. Moore v. Mylan Inc., No. 1:11-CV-03037-MHS, 2012 U.S. Dist. LEXIS 6897 (N.D. Ga. Jan. 5, 2012).

Summary judgment granted. — Defendants were entitled to summary judgment on plaintiffs' product liability claims, since plaintiffs failed to show that the rollover accident was caused by a defect in the vehicle's design, and failed to rebut defendants showing that the accident was caused by the vehicle being driven off the roadway after the driver fell asleep. Jonas v. Isuzu Motors Ltd., 210 F. Supp. 2d 1373 (M.D. Ga. 2002).

Trial court did not err in granting summary judgment to a manufacturer in a driver's products liability action because the manufacturer presented evidence disproving the existence of a defect through the opinion of the manufacturer's expert witness, and the driver failed to point to any competent evidence giving rise to a genuine issue of material fact. Udoinyion v. Michelin N. Am., Inc., 313 Ga. App. 248, 721 S.E.2d 190 (2011).

Dentist as expert witness. — In a consumer's suit alleging strict products liability, the consumer's failure to identify a treating dentist as an expert witness under Fed. R. Civ. P. 26(a)(2) was harmless because defendants had adequate notice that the dentist could be called as a witness and, in fact, already took the dentist's deposition. Silverstein v. P&G Mfg. Co., 700 F. Supp. 2d 1312 (S.D. Ga. Oct. 30, 2009).

Amended complaint properly denied. — Individual's motion for leave to file an amended complaint was denied since the individual's additional allegations failed to demonstrate that a pharmaceutical manufacturer's affiliate was the manufacturer of the drug that allegedly caused the individual's injuries or that the drug included a design or manufacturing defect, and as a result the individual's O.C.G.A. § 51-1-11(b) claim would have been subject to dismissal. Henderson v. Sun Pharms. Indus., No. 4:11-CV-0060-HLM, 2011 U.S. Dist. LEXIS 104999 (N.D. Ga. Aug. 22, 2011).

Lex loci delicti did not apply. — Public policy exception to lex loci delicti applied and Georgia law should have been applied in a design defect products liability case because Georgia recognized strict liability in such cases, pursuant to O.C.G.A. § 51-1-11, whereas Indiana law required a showing that the manufacturer failed to exercise reasonable care under the circumstances. Bailey v. Cottrell, Inc., 313 Ga. App. 371, 721 S.E.2d 571 (2011).

8. Defenses

Discovery of defect by product user.

Injured party's admission that the installation of an x-ray machine was itself the consequence of the contract rendered the claims nonperformance of a contract obligation, within the ambit of O.C.G.A. § 51-1-11(a), and, consequently, the injured party's negligence claims were barred by that statute. Kidd v. Dentsply Int'l, Inc., 278 Ga. App. 346, 629 S.E.2d 58 (2006).

Expert testimony not required. — Whether someone suffers greater injuries

in a car wreck when a seat belt does not work to restrain the individual and an air bag does not inflate between the individual and the steering wheel, windshield, and mirror are not issues requiring the expert testimony of trauma physician or engineer, but are matters not of science but of skill and experience. Owens v. GMC, 272 Ga. App. 842, 613 S.E.2d 651 (2005).

Whether a seat belt engaged properly or an air bag deployed are not matters of science and issues requiring the expert testimony of an engineer or a metallurgist, but are matters of skill and experience. Owens v. GMC, 272 Ga. App. 842, 613 S.E.2d 651 (2005).

9. Jury Questions

Whether product is defective is jury question.

Injured party presented a triable issue as to a claim that the truck's safety systems were defective and that a manufacturer was strictly liable as a repair technician testified in detail about how the air bags were supposed to deploy, how it worked, and how the sensor failed when the weld attaching it to the frame broke; the technician also testified that the seat belt would not catch, and even demonstrated that fact at a deposition. Owens v. GMC, 272 Ga. App. 842, 613 S.E.2d 651 (2005).

Whether injuries compounded. — Injured party presented a triable issue as to whether the party suffered greater injuries in an accident because the seat belt and air bag did not work properly as: (1) a repair technician testified that the rear-view mirror had been knocked off the windshield and had hair stuck to it and that the steering wheel was "folded over"; (2) the injured party's wife testified that the injured party broke glasses, had a black eye, a knot on the head, and a bruised sternum; (3) the injured party testified that the party hit the mirror, the windshield, and the steering wheel because the seat belt did not catch and the air bag did not deploy; and (4) the treating physician testified that the injured party suffered a nasal fracture that caused pain after the wreck, blocked the tear duct and caused swelling and infection until it was corrected surgically. Owens v. GMC, 272 Ga. App. 842, 613 S.E.2d 651 (2005).

Jury instruction on failure to recall error. — Legislature showed in O.C.G.A. § 51-1-11 that the legislature knew how to impose a continuing duty to warn on product manufacturers. There was no corresponding continuing duty to recall an allegedly defective vehicle seatback, and a jury instruction allowing a jury to find negligence based on a failure to recall was reversible error. Ford Motor Co. v. Reese, 300 Ga. App. 82, 684 S.E.2d 279 (2009), cert. denied, No. S10C0186, 2010 Ga. LEXIS 161 (Ga. 2010).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Defective Mobile Home, 17 POF2d 213.

Formaldehyde Fumes Emitted by Building Materials, 3 POF3d 225.

Defective Design of an All-Terrain vehicle, 6 POF3d 93.

Defective Design of Golf Cart, 7 POF3d 225.

Defective Forklift Truck, 8 POF3d 615.

Defective Automobile Child Safety Restraint, 21 POF3d 115.

Proof of Automobile Design Defect, 59 POF3d 73.

ALR. — Modern status of rules regarding tort liability of building or construction contractor for injury or damage to third person occurring after completion and acceptance of work; "foreseeability" or "modern" rule, 75 ALR5th 413.

Products liability: ladders, 81 ALR5th 245.

Products liability: firearms, ammunition, and chemical weapons, 96 ALR5th 239.

Products liability: Household equipment relating to storage, preparation, cooking, and disposal of food, 122 ALR5th 515.

51-1-11.1. Liability of product seller as a manufacturer.

Law reviews. — For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005). For annual survey of product liability law, see 58 Mercer L. Rev. 313 (2006). For survey article on product liability law, see 60 Mercer L. Rev. 303 (2008).

JUDICIAL DECISIONS

Product "seller" rather than "manufacturer."

A pharmacist and pharmacy that package and label drugs manufactured by another are product sellers, not manufacturers, within the meaning of strict products liability. Robinson v. Williamson, 245 Ga. App. 17, 537 S.E.2d 159 (2000).

In a personal injury and products liability action where the seller of an engine had no active participation in the design of an alleged defective wood chipper, and the seller's only input into the design was limited to saying in essence that the particular engine would perform adequately in such a chipper, the trial court properly granted summary judgment to the seller since the seller did not qualify in any manner as a manufacturer of the alleged defective chipper. Davenport v. Cummins Alabama, Inc., 284 Ga. App. 666, 644 S.E.2d 503 (2007).

Cited in Dean v. Toyota Indus. Equip. Mfg., Inc., 246 Ga. App. 255, 540 S.E.2d 233 (2000); Carolina Tobacco Co. v. Baker, 295 Ga. App. 115, 670 S.E.2d 811 (2008); Coosa Valley Tech. College v. West, 299 Ga. App. 171, 682 S.E.2d 187 (2009).

RESEARCH REFERENCES

ALR. — Products liability: ladders, 81 ALR5th 245.

51-1-12. Liability for ratifying tort.

Law reviews. — For annual survey of labor and employment law, see 58 Mercer L. Rev. 211 (2006).

JUDICIAL DECISIONS

Analysis

Applicability to Specific Cases

Applicability to Specific Cases

Conduct beyond scope of employment.

Because a co-employee who sexually harassed an employee was acting exclusively for himself and was not acting at all for the employer, although the actions occurred in the course of the employment, they did not arise out of the employment, and the employer could not be held liable under a vicarious liability theory of either respondeat superior or ratification for the co-employee's actions pursuant to common law and O.C.G.A. § 51-1-12; accordingly, the employer should have been granted summary judgment on the employee's claim to that effect. Travis Pruitt & Assocs., P.C. v. Hooper, 277 Ga. App. 1, 625 S.E.2d 445 (2005).

51-1-13. Cause of action for physical injury; intention considered in assessing damages.

Cross references. — Settlement offers and agreement for personal injury, bodily injury, and death from motor vehicle, § 9-11-67.1.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Intent of agressor not a factor. — Four refugees showed that the former Bosnian-Serb soldier committed extensive physical injuries against all of them, without their consent, and in a harmful and offensive manner. Therefore, the soldier was liable to the refugees under Georgia law for assault and battery, regardless of the soldier's intent. Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002).

Injury caused by a federal officer. — Inmate's battery claim against the United States, which was based on injuries the inmate sustained when a federal agent, who was attempting to arrest the inmate pursuant to a warrant, moved the agent's vehicle to block the inmate's escape, failed under the federal Tort Claims Act, 28 U.S.C. § 2680(h), because under applicable state law regarding a battery claim, O.C.G.A. § 51-1-13, the agent was justified in using force reasonably necessary to effectuate the arrest, and under the totality of the circumstances, the agent did not use more force than was reasonably necessary. Williams v. United States, 314 Fed. Appx. 253 (11th Cir. 2009) (Unpublished).

Summary judgment inappropriate. Grant of summary judgment in favor of the employee on the employee's claim of battery was reversed where there were factual issues regarding whether the co-worker's conduct constituted an offensive touching and whether it was intentional. Vasquez v. Smith, 259 Ga. App. 79, 576 S.E.2d 59 (2003).

Trial court properly denied summary judgment to a former supervisor in a former employee's action arising from an improper touching that the supervisor allegedly committed to the employee while pretending to reach out to shake the employee's hand, as there was a relatively low threshold required to prove the claimed battery, and the court was required to view all evidence in the light most favorable to the employee as the non-movant. MARTA v. Mosley, 280 Ga. App. 486, 634 S.E.2d 466 (2006).

Viewing the evidence in the light most favorable to an arrestee who was shot in the face by an officer during a traffic stop, the officer's use of force was not justified because the arrestee's car was stopped and not moving at the time the officer shot the arrestee. Therefore, the officer was not entitled to qualified immunity and summary judgment on the arrestee's claims. Porter v. Massarelli, 303 Ga. App. 91, 692 S.E.2d 722 (2010).

Cited in Draper v. Reynolds, 278 Ga. App. 401, 629 S.E.2d 476 (2006).

RESEARCH REFERENCES

ALR. — Skier's liability for injuries to or death of another person, 75 ALR5th 583.

Comparative negligence, contributory negligence, and assumption of risk in action against owner of store, office, or similar place of business by invitee falling on tracked-in water or snow, 83 ALR5th 589.

51-1-14. Violent injury or attempt to commit injury.

JUDICIAL DECISIONS

Actual touching of victim not required. — Evidence supported an award of damages for the tort of assault and intentional infliction of emotional distress where the parent of a child in daycare harassed the daycare provider by tailgating the provider, cutting the provider off, and running the provider off the road. Edwards v. Sabat, 263 Ga. App. 852, 589 S.E.2d 618 (2003).

Cited in Wallace v. Stringer, 250 Ga. App. 850, 553 S.E.2d 166 (2001); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002); Draper v. Reynolds, 278 Ga. App. 401, 629 S.E.2d 476 (2006).

51-1-17. Rights of action for adultery, alienation of affections, and criminal conversation abolished.

JUDICIAL DECISIONS

Professional liability claims. — Patient could not bring a medical malpractice claim for damages against a family doctor for interference with the patient's marriage, loss of affection, or depression and anxiety that resulted from the doctor having an affair with the patient's wife because O.C.G.A. § 51-1-17 abolished torts claims for adultery and alienation of affections. The patient's claim of breach of fiduciary duty/confidential relationship was nothing more than a renamed claim of the torts banned by O.C.G.A. § 51-1-17. Witcher v. McGauley, 316 Ga. App. 574, 730 S.E.2d 56 (2012).

Cited in Brewer v. Paulk, 296 Ga. App. 26, 673 S.E.2d 545 (2009).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Proof of Alienation of Affections, 54 POF3d 135.

ALR. — Action for intentional infliction of emotional distress against paramours, 99 ALR5th 445.

Intentional infliction of distress in marital context, 110 ALR5th 371.

51-1-18. Furnishing alcoholic beverages to minor children; gambling with minor children.

Law reviews. — For annual survey of tort law, see 58 Mercer L. Rev. 385 (2006).

JUDICIAL DECISIONS

Parent's participation in sting operation. — When parents willingly participated in a sting operation in which they anticipated that a provider would attempt to serve alcohol to their underage children, the parents could not recover damages against the provider under O.C.G.A. § 51-1-18(a). Allowing the parents to recover in such a circumstance would be unreasonable and would not serve the purpose of the statute, which was to prevent the furnishing of alcoholic beverages to underage children in the absence of parental consent. Abreu v. Rainey, 293 Ga. App. 597, 667 S.E.2d 434 (2008).

Serving alcohol to teenager over age of majority. — Trial court errone-

ously denied a motion to dismiss a personal injury action filed by two parents against two social hosts, arising out the death of the parents' 20-year-old daughter, which alleged that the social hosts served the daughter alcohol, and the daughter died when the daughter drunkenly drove into a tree after leaving the social hosts' home, as the action was barred due to the fact that the daughter had already reached the age of majority at the time of the accident. Penny v. McBride, 282 Ga. App. 590, 639 S.E.2d 561 (2006), cert. denied, 2007 Ga. LEXIS 223 (Ga. 2007).

Summary judgment improperly granted to property owner and party guests. — Trial court erred in granting summary judgment to a property owner and the party guests, as to a mother's claims that they provided alcohol to a minor, who later was killed in an auto accident, in violation of O.C.G.A. § 51-1-18(a), as there was a triable issue of fact where the evidence indicated that the owner allowed the guests to bring kegs of beer to the party, at which most of the other guests were minors, and that the guests knowingly allowed the deceased minor to drink beer from the kegs; the mother was not precluded from recovering damages under O.C.G.A. § 51-12-6, as there was a triable issue of fact as to whether these acts were intentional. Mowell v. Marks, 277 Ga. App. 524, 627 S.E.2d 141 (2006).

51-1-19. Negligence by person given trust or confidence for consideration.

JUDICIAL DECISIONS

Cited in Benson v. McMillan, 261 Ga. App. 78, 581 S.E.2d 707 (2003).

51-1-20. Liability of persons serving charitable organizations and public entities while acting in good faith.

JUDICIAL DECISIONS

Immunity upheld.

Pursuant to O.C.G.A. § 51-1-20(a), defendant president, as an uncompensated officer of a non-profit farm bureau, was immune from civil liability in employee's tortious interference with an employment contract action for the president's good faith performance of official duties as president of the farm bureau in communicating to the employee's employer a request to transfer the employee. Culpepper v. Thompson, 254 Ga. App. 569, 562 S.E.2d 837 (2002).

Cited in Stephens v. Conyers Apostolic Church, 243 Ga. App. 170, 532 S.E.2d 728 (2000).

51-1-20.1. Liability of volunteers, employees, or officers of nonprofit association conducting or sponsoring sports or safety program; liability of association.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — School's Failure to Maintain Children's Play Area Properly, 9 POF2d 729.

Sport Injury — Negligence, 15 POF2d 1.

Playground Accidents — Human Impact Tolerance, 21 POF2d 701.

Negligent Operation or Public Swimming Pool, 34 POF2d 63.

Inadequate Protection of Spectator at Sporting Event, 45 POF2d 407.

Liability for Trampoline Injury, 45 POF2d 469.

Assumption of Risk Defense in Sports or Recreation Injury Cases, 30 POF3d 161.

Liability for Errant Golf Ball Shots, 31 POF3d 87.

Negligent Operation of Gymnasium, Health Club, or Similar Facility, 40 POF3d 111.

51-1-20.2. Liability of child passenger safety technicians.

(a) As used in this Code section, the term:

(1) "Child passenger safety technician" means a person who holds a current certification as a child passenger safety technician or technician instructor by the National Highway Traffic Safety Administration of the United States Department of Transportation, the American Automobile Association, or other entity designated by the National Highway Traffic Safety Administration but specifically does not include any person who is an employee or agent of a manufacturer of child safety seats.

(2) "Child safety seat" means a seat as defined in paragraph (1) of subsection (b) of Code Section 40-8-76.

(3) "Sponsoring organization" means a person or organization other than a manufacturer of or an employee or agent of a manufacturer of child safety seats that:

(A) Offers or arranges for the public a nonprofit child safety seat educational program, checkup event, or fitting station program utilizing child passenger safety technicians; or

(B) Owns property upon which a nonprofit child safety seat educational program, checkup event, or fitting station program for the public occurs utilizing child passenger safety technicians.

(b) A child passenger safety technician or sponsoring organization shall not be liable to any person as a result of any act or omission that occurs solely in the inspection, installation or adjustment of a child safety seat, or in providing education regarding the installation or adjustment of a child safety seat if the child passenger safety technician or sponsoring organization provides the services without a fee and acts in good faith within the scope of training for which the technician is currently certified and unless the act or omission constitutes willful and wanton misconduct or gross negligence.

(c) Nothing in this Code section shall be construed as affecting, modifying, or eliminating the liability of a manufacturer of a child safety seat or its employees or agents under any legal claim, including but not limited to product liability claims.

(d) This Code section shall apply to any cause of action arising on or after July 1, 2002. (Code 1981, § 51-1-20.2, enacted by Ga. L. 2002, p. 1140, § 1.)

Effective date. — This Code section became effective July 1, 2002.

Cross references. — Safety restraints for children six years of age or younger, § 40-8-76.

Law reviews. — For note on the 2002 enactment of this chapter, see 19 Ga. St. U.L. Rev. 339 (2002).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Defective Automobile Child Safety Restraint, 21 POF3d 115.

Proof of Injury Resulting from Defects in Child Safety Seat, 77 POF3d 85.

51-1-23. Sale of unwholesome provisions.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
APPLICABILITY TO SPECIFIC CASES

General Consideration

Emotional distress. — Summary judgment pursuant to O.C.G.A. § 9-11-56(c) to a restaurant was properly granted by a trial court in an action by a restaurant patron, alleging that the patron suffered emotional distress when the patron discovered two blood spots on the french fry container, as the patron feared contracting HIV or hepatitis, because the patron failed to provide evidence of more than the patron's "fear" that the patron had been exposed to the diseases; accordingly, the patron's claims for negligence, negligence per se, and breach of the implied warranty of merchantability, under O.C.G.A. §§ 11-2-314 and 51-1-23, failed due to the patron's failure to meet the damages requirement. Wilson v. J & L Melton, Inc., 270 Ga. App. 1, 606 S.E.2d 47 (2004).

Applicability to Specific Cases

Vehicle manufacturer. — Because Georgia law prohibited recovery for wrongful death under a theory of breach of warranty pursuant to O.C.G.A. § 51-1-23, a warranty claim brought by parents based on the death of their daughter in an auto accident failed on summary judgment. Davenport v. Ford Motor Co., No. 1:05-cv-3047-WSD, 2007 U.S. Dist. LEXIS 91245 (N.D. Ga. Dec. 11, 2007).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Foreign Substance in Food or Beverage, 30 POF2d 1.

Food Poisoning, 31 POF2d 31.

Cigarette Manufacturer's Liability for Mesothelioma Caused by Asbestos Fibers in Cigarette Filters, 39 POF3d 181.

51-1-24. Sale of adulterated drugs or alcoholic beverages.

Law reviews. — For note, "Does the National Childhood Vaccine Injury Compensation Act Really Prohibit Design Defect Claims?: Examining Federal Preemp-

tion in Light of American Home Products Corp. v. Ferrari," see 26 Ga. St. U.L. Rev. 617 (2010).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 8C Am. Jur. Pleading and Practice Forms, Drugs, Narcotics, and Poisons, § 13.

Am. Jur. Proof of Facts. — Injuries from Drugs, 7 POF3d 1.

51-1-25. Furnishing of wrong article or medicine by vender of drugs and medicines.

Law reviews. — For note, "Does the National Childhood Vaccine Injury Compensation Act Really Prohibit Design Defect Claims?: Examining Federal Preemption in Light of American Home Products Corp. v. Ferrari," see 26 Ga. St. U.L. Rev. 617 (2010).

51-1-27. Recovery for medical malpractice authorized.

Law reviews. — For article, "State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010).

JUDICIAL DECISIONS

Analysis

General Consideration

Sexual relationship with a patient. — Patient could not bring a medical malpractice claim under O.C.G.A. § 51-1-27 against a family doctor for interference with the patient's marriage, loss of affection, or depression and anxiety that resulted from the doctor having an affair with the patient's wife because O.C.G.A. § 51-1-17 abolished torts claims for adultery and alienation of affections. The patient failed to allege an error of professional skill or judgment with regard to the doctor's care. Witcher v. McGauley, 316 Ga. App. 574, 730 S.E.2d 56 (2012).

Impact rule does not apply to medical malpractice actions. — Trial court should not have granted a psychiatrist summary judgment in a patient's medical malpractice action because the court erred in applying the impact rule; the medical malpractice statute, O.C.G.A. § 51-1-27, which provides that "any injury" resulting from the breach of a physician's duty is a compensable injury, is not limited by the application of the "impact rule," and there is no rational basis for applying the rule to causes of action sounding in medical malpractice. Bruscato v. O'Brien, 307 Ga. App. 452, 705 S.E.2d 275 (2010).

Policy concerns traditionally given for having the impact rule and denying recovery for emotional distress unrelated to physical injuries are not present in medical malpractice cases because such cases require a physician-patient relationship between the defendant and the plaintiff;

consequently, there is no question to be resolved regarding the emotional impact of the defendant's alleged negligence on third parties or bystanders, nor is there concern about a "flood of litigation" arising from such negligence, and the concern about avoiding fraudulent or frivolous lawsuits is already addressed by the strict pleading requirements of O.C.G.A. § 9-11-9.1, the purpose of which is to reduce the number of frivolous malpractice suits being filed. Bruscato v. O'Brien, 307 Ga. App. 452, 705 S.E.2d 275 (2010).

Failure to diagnose. — Trial court erred in denying a radiologist's motion for summary judgment on a patient's claim that the radiologist should have ordered an MRI with intravenous contrast, allowing earlier diagnosis of an epidural abscess, because the radiologist was unaware that the patient was a diabetic and showed signs of an infection, and there was no evidence that, lacking this knowledge, the radiologist deviated from the standard of care. Meli v. Hicks, 300 Ga. App. 894, 686 S.E.2d 489 (2009), cert. denied, No. S10C0504, 2010 Ga. LEXIS 254 (Ga. 2010).

Trial court erred by granting the attending physician summary judgment because the expert testimony presented a genuine issue of material fact as to whether the patient's death could have been avoided if the attending physician had prior diagnosed the patient's condition in the emergency room in compliance with the applicable standard of care. The experts testified that the attending physician deviated from the standard of care when the physician failed to obtain a CT scan imaging of the patient's aorta to make the diagnosis of an aortic dissection, and if the diagnosis had been made timely, it could have been successfully repaired. Knight v. Roberts, 316 Ga. App. 599, 730 S.E.2d 78 (2012).

Failure to exercise care and skill, etc.

Trial court erred by refusing to give requested jury instructions that because a physician must bring to the exercise of that profession the requisite degree of care and skill, the physician may be held liable for failure to exercise either the required care or the required skill. Brown v. Macheers, 249 Ga. App. 418, 547 S.E.2d 759 (2001).

Expert opinion. — It was error to reverse a jury verdict for a surgeon and the surgeon's medical corporation in a medical malpractice case because the trial court's charge that the patient's expert's opinion had to be based on reasonable medical certainty and based on more than speculation was sufficient under Georgia law. Zwiren v. Thompson, 276 Ga. 498, 578 S.E.2d 862 (2003).

Aborted pregnancy based on physician's misrepresentation. — Where a mother terminated her pregnancy based on a doctor's misrepresentation of the results of pre-natal testing, the mother, but not the father, was entitled to damages for medical malpractice and breach of fiduciary duty. Breyne v. Potter, 258 Ga. App. 728, 574 S.E.2d 916 (2002).

Cited in Cannon v. Jeffries, 250 Ga. App. 371, 551 S.E.2d 777 (2001).

Applicability to Special Cases

2. Hospitals

Veteran's hospital not liable when veteran failed to follow treatment plan. — There is a presumption in a medical malpractice case that the physician performed in an ordinarily skillful manner so that the burden is upon the plaintiff to show a want of care or skill; a veteran whose leg was amputated after the veteran failed to comply with a Veterans Administration (VA) treatment plan for the veteran's diabetes and related foot ulcer failed to show that VA personnel breached the standard of care set out in O.C.G.A. § 51-1-27 and that the amputation would have been unnecessary if another treatment plan had been used. Moreover, the evidence plainly established that the veteran's negligence in failing to comply with the veteran's treatment plan exceeded the negligence, if any, by VA personnel, so the veteran could not recover under O.C.G.A. § 51-11-7. Kimbrough v. United States Gov't, No. 1:07-CV-1517-RWS, 2008 U.S. Dist. LEXIS 77793 (N.D. Ga. Oct. 2, 2008).

Actions of nurses. — Trial court did not err by denying the hospital's motion for summary judgment because experts

testified that the hospital's nurses failed to properly triage the patient and did not immediately carry out the attending physician's orders for the patient's medications and treatment until almost an hour after the orders were given. Knight v. Roberts, 316 Ga. App. 599, 730 S.E.2d 78 (2012).

3. Unlicensed Practitioners

Fact that nurse failed board exam was irrelevant. — In a medical malpractice action filed by plaintiff parents against a pediatrician, a nurse, and others, trial court did not abuse its discretion by prohibiting the parents from showing that the nurse failed to pass the nursing board examination, as such evidence was irrelevant, and even if it could be said that it had any probative value, it was substantially outweighed by the danger of undue prejudice. Snider v. Basilio, 281 Ga. 261, 637 S.E.2d 40 (2006).

4. Surgeons

Expert opinion not supported by records. — Medical records that provided no information about the patient's second visit to the emergency room, the timing of the discovery of a ruptured appendix, or the exploratory surgery that resulted in an appendectomy were too general to support an expert's conclusion that the doctors' conduct proximately caused the patient's injuries. Jones v. Orris, 274 Ga. App. 52, 616 S.E.2d 820 (2005).

Pleading and Practice

Sufficiency of pleadings.

In a Federal Tort Claims Act case, a district court's entry of summary judgment in favor of the government was affirmed because the inmate did not present evidence to raise a genuine issue of material fact as to the penitentiary medical staff's negligence in response to the government's motion for summary judgment; in fact, he produced no evidence indicating that the medical staff failed to exercise the requisite care in treating and diagnosing him and failed to establish medical malpractice under O.C.G.A. § 51-1-27. Duque v. United States, 216 Fed. Appx. 830 (11th Cir. 2007) (Unpublished).

Expert testimony must establish requisite degree of care and skill.

Trial court did not err in denying a psychiatrist's motion for summary judgment in a patient's medical malpractice action because whether the psychiatrist breached duties arising from the psychiatrist-patient relationship was an issue of fact; pursuant to O.C.G.A. § 9-11-9.1, the patient presented expert testimony that the psychiatrist's breaches of the duty of care directly resulted in the foreseeable harm of the patient's attempting suicide. Peterson v. Reeves, 315 Ga. App. 370, 727 S.E.2d 171 (2012).

Summary judgment in favor of psychiatrist improper. — Because a patient had not been convicted of murder, no court had entered a judgment finding the patient mentally competent at the time of the crime, and the evidence did not establish, as a matter of law, that the patient was mentally competent when the patient killed the patient's mother, the patient was presumed innocent under O.C.G.A. § 16-1-5 and was not a "wrongdoer" whose status as such would be a bar to any of the patient's medical malpractice claims against a psychiatrist, and consequently, summary judgment on that issue or any issue relating to the patient's contributory negligence for causing the patient's mother's death was not authorized by the evidence since a jury issue existed as to whether the patient had the requisite mental capacity to commit murder. Bruscato v. O'Brien, 307 Ga. App. 452, 705 S.E.2d 275 (2010).

Whether the requisite degree of care and skill has been exercised is question of fact for determination by jury.

Trial court did not err in denying a psychiatrist's motion for summary judgment in a patient's medical malpractice action because whether the psychiatrist breached duties arising from the psychiatrist-patient relationship was an issue of fact; under O.C.G.A. §§ 37-3-4 and 51-1-27, the psychiatrist could be held liable if the treatment of the patient fell below the requisite standard of care, and that failure proximately caused the patient's injury. Peterson v. Reeves, 315 Ga. App. 370, 727 S.E.2d 171 (2012).

Failure to commit patient. — Under some circumstances, the failure to commit may constitute a breach of the well-established duty of care physicians owe patients, and when a fact question has been created on that issue, it is for the jury. Peterson v. Reeves, 315 Ga. App. 370, 727 S.E.2d 171 (2012).

Jury charge as to physician care and skill requirements. — Trial court did not err in denying patient's requested charge on the exercise of the requisite skill and care required of a physician, as charge given by court gave full and correct statement of law regarding care and skill required of a physician and proof required to support a medical malpractice claim; moreover, no abuse resulted from the trial court's refusal to strike challenged defense expert's testimony, as question of fact existed as to whether he applied the appropriate standard, and it was up to the jury to weigh this testimony and determine if it met the standard under court's charge. West v. Breast Care Specialists, LLC, 290 Ga. App. 521, 659 S.E.2d 895 (2008).

"Hindsight" instruction. — First sentence of the suggested pattern "hindsight" charge states that, "In a medical malpractice action, a defendant cannot be found negligent on the basis of an assessment of a patient's condition that only later, in hindsight, proves to be incorrect as long as the initial assessment was made in accordance with reasonable standards of medical care." This portion of the instruction is appropriate in any case where the negligence claim is based in whole or in part on the assertion that the physician made an incorrect assessment of a patient's condition. Smith v. Finch, 285 Ga. 709, 681 S.E.2d 147 (2009).

Second and third sentences of the suggested pattern "hindsight" charge state that, "In other words, the concept of negligence does not include hindsight. Negligence consists of not foreseeing and guarding against that which is probable and likely to happen, not against that which is only remotely and slightly possible." As the third sentence is not a correct statement of the law, and the second is duplicative of the first sentence, they are disapproved, as are cases in which they were upheld, e.g., Steele v. Atlanta Maternal-Fetal Medicine, 610 S.E.2d 546 (Ga. App. 2005); Betha v. Ebanks, 589 S.E.2d 831 (Ga. App. 2003); Cherry v. Schwindt, 584 S.E.2d 673 (Ga. App. 2003); Brannen v. Prince, 421 S.E.2d 76 (Ga. App. 1992); Gillis v. City of Waycross, 543 S.E.2d 423 (Ga. App. 2000); and Haynes v. Hoffman, 296 S.E.2d 216 (Ga. App. 1982). Smith v. Finch, 285 Ga. 709, 681 S.E.2d 147 (2009).

"Later acquired knowledge" standard for evaluating the giving of the "hindsight" instruction in medical malpractice cases is disapproved. Smith v. Finch, 285 Ga. 709, 681 S.E.2d 147 (2009).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Proof of Failure to Diagnose Diabetes or Complications of Diabetes, 51 POF3d 1.

Medical Malpractice in Tonsillectomies, 57 POF3d 381.

Proof of Injury Resulting from Prescription Medication Rezulin, 74 POF3d 141.

Proof of Injury Resulting from Liposuction Surgery, 82 POF3d 1.

ALR. — Contributory negligence or comparative negligence based on failure of patient to follow instructions as defense in action against physician or surgeon for medical malpractice, 84 ALR5th 619.

Medical negligence in extraction of tooth, established through expert testimony, 18 ALR6th 325.

51-1-28. Transfusions, transplants, and transfers of human blood, tissue, organs; negligence prerequisite to recovery for damages.

RESEARCH REFERENCES

ALR. — Validity, construction, and application of blood shield statutes, 75 ALR5th 229.

51-1-29. Liability of persons rendering emergency care.

Law reviews. — For article, "Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism," see 44 Ga. L. Rev. 607 (2010).

JUDICIAL DECISIONS

Scope of section.

Good Samaritan Statute, O.C.G.A. § 51-1-29, applied when a truck driver witnessed an accident on a highway in which two vehicles veered off the road into a ravine and the truck driver stopped in an emergency lane to run into the ravine to provide assistance; summary judgment in favor of the driver, the driver's employer, and the driver's insurer in a suit brought by passengers in a car which collided with the driver's truck within minutes was proper. Reid v. Midwest Transp., 270 Ga. App. 557, 607 S.E.2d 170 (2004).

Emergencies in which doctors are protected.

Trial court properly granted summary judgment to a doctor in a medical malpractice action by a patient, based on the application of the "Good Samaritan" exemption from liability, as the patient was treated at the scene of an emergency as a result of tornado injuries, the patient received emergency care due to the unforeseen circumstance that called for immediate action, and the fact that the patient was not in a critical or life-threatening condition was not a dispositive fact because the physician did not have a contractual duty to render treatment, as the physician was not scheduled to be in the emergency room at that time, and he was not compensated for the services. Willingham v. Hudson, 274 Ga. App. 200, 617 S.E.2d 192 (2005).

Rule of sudden emergency.

Trial court did not err in entering summary judgment in favor of an arts center in a widow's wrongful death action because the center owed no duty to provide emergency medical services to the husband; the widow pointed to no statutory enactment that would impose a duty on the center to provide emergency medical services to the patrons of the center's concerts, and no common law principle imposed such a duty. Boller v. Robert W. Woodruff Arts Ctr., Inc., 311 Ga. App. 693, 716 S.E.2d 713 (2011).

Summary judgment proper. — In a negligence action filed by the parents on behalf of their injured child, because jury questions remained as to whether a doctor had to provide immediate "emergency care at the scene of an accident or emergency" to the child within the meaning of the Good Samaritan statute, O.C.G.A. § 51-1-29, as well as the employer-hospital's immunity from any vicarious liability, summary judgment was erroneously entered against the parents and in favor of both the doctor and the hospital. Gilley v. Hudson, 283 Ga. App. 878, 642 S.E.2d 898 (2007).

In a tree trimmer's negligence suit against a friend and the property owners (the defendants) of certain land upon which the tree trimmer was cutting limbs off of trees and fell from a ladder, the trial court properly granted the defendants summary judgment as there were no genuine issues of material fact existing to establish that the defendants' actions in

delaying medical care and allegedly improperly moving the tree trimmer after the fall caused any of the injuries that were incurred. Henderson v. Sargent, 297 Ga. App. 504, 677 S.E.2d 709 (2009), cert. denied, No. S09C1399, 2009 Ga. LEXIS 790 (Ga. 2009).

Summary judgment improper on doctor's motion for directed verdict. — Testimony of one of the patient's experts in a medical malpractice case, which described the patient's situation as an orthopedic emergency that had to be treated within six hours, was not evidence that warranted the grant of a directed verdict on the doctor's Good Samaritan defense under O.C.G.A. § 51-1-29; a jury question existed as to whether the doctor provided the patient with emergency care upon circumstances requiring immediate action. The trial court properly charged the jury regarding the defense, and did not err in denying the doctor's motion for a directed verdict or post-trial motions on the Good Samaritan defense. Gilley v. Hudson, 299 Ga. App. 306, 682 S.E.2d 627 (2009), cert. denied, No. S09C1986, 2010 Ga. LEXIS 8 (Ga. 2010); cert. denied, No. S09C1987, 2010 Ga. LEXIS 24 (Ga. 2010).

51-1-29.1. Liability of voluntary health care provider and sponsoring organization.

(a) Without waiving or affecting and cumulative of any existing immunity from any source, unless it is established that injuries or death were caused by gross negligence or willful or wanton misconduct:

(1) No health care provider licensed under Chapter 9, 11, 26, 30, 33, or 34 of Title 43 who voluntarily and without the expectation or receipt of compensation provides professional services, within the scope of such health care provider's licensure, for and at the request of a hospital, public school, nonprofit organization, or an agency of the state or one of its political subdivisions or provides such professional services to a person at the request of such an organization, which organization does not expect or receive compensation with respect to such services from the recipient of such services; or

(2) No licensed hospital, public school, or nonprofit organization which requests, sponsors, or participates in the providing of the services under the circumstances provided in paragraph (1) of this subsection

shall be liable for damages or injuries alleged to have been sustained by the person nor for damages for the injury or death of the person when the injuries or death are alleged to have occurred by reason of an act or omission in the rendering of such services.

(b) Nothing in this Code section shall be construed to change the scope of practice of any health care provider granted immunity in this Code section.

(c) This Code section shall apply only to causes of action arising on or after July 1, 1987. (Code 1981, § 51-1-29.1, enacted by Ga. L. 1987, p. 887, § 4; Ga. L. 1987, p. 986, § 2; Ga. L. 1998, p. 859, § 1; Ga. L. 1999, p. 81, § 51; Ga. L. 2007, p. 47, § 51/SB 103.)

The 2007 amendment, effective May 11, 2007, part of an Act to revise, modernize, and correct the Code, in paragraph (a)(1), revised punctuation, and deleted "Nothing in this Code section shall be construed to change the scope of practice of any health care provider granted immunity in this Code section" following "such services" near the end; added present subsection (b); and redesignated former subsection (b) as subsection (c).

Law reviews. — For article, "Torts," see 53 Mercer L. Rev. 441 (2001).

JUDICIAL DECISIONS

Prima facie case of immunity, etc. under O.C.G.A. § 51-1-29.1 was established by a physician's affidavit that neither he nor his professional corporation expected or received any public or private source payment for his on-call services. Washington v. Clark, 250 Ga. App. 242, 550 S.E.2d 671 (2001).

In a medical malpractice action, as affidavits from a decedent's mother and girlfriend created an fact issue regarding a doctor's expectation of payment which required resolution by a jury, the trial court erred in granting the doctor's summary judgment motion pursuant to O.C.G.A. § 51-1-29.1. Travick v. Lee, 278 Ga. App. 823, 630 S.E.2d 99 (2006).

Summary judgment in favor of a doctor and a clinic for the post-op treatment of a patient was upheld on appeal, as: (1) both remained immune from suit under O.C.G.A. § 51-1-29.1; (2) the doctor's treatment of the decedent's complications immediately following her surgery did not change the voluntary nature of the treatment as a whole; (3) it was reasonable to expect that a physician would continue to treat a patient following surgery; and (4) the appeals court viewed the doctor's voluntary treatment of the decedent as a whole, not divided into categories of preoperative, operative, and post-operative; moreover, because no evidence was presented that either the doctor or the clinic was a "charitable institution," and O.C.G.A. § 51-1-29.1 provided no such exception, waiver of any common-law charitable immunity through the doctor's procurement of liability insurance did not apply. Wells v. Rogers, 281 Ga. App. 473, 636 S.E.2d 171 (2006), cert. denied, 2007 Ga. LEXIS 101 (Ga. 2007).

51-1-29.2. Liability of persons or entities acting to prevent, minimize, and repair injury and damage resulting from catastrophic acts of nature.

Any natural person and any association, fraternal organization, private for profit entity, not for profit entity, religious organization, or charitable organization and the officers, directors, employees, and agents of such associations, organizations, and entities, when such persons, associations, organizations, or entities are working in coordination and under the direction of an appropriate state agency, who voluntarily and without the expectation or receipt of compensation provides services or goods in preparation for, anticipation of, or during a time of emergency and in a place of emergency as declared by the Governor for the benefit of any natural person or his or her property to prevent or minimize harm to such natural person or to prevent, minimize, and repair injury and damage to such person's property resulting from biological, chemical, or nuclear agents; terrorism; pandemics or epidemics of infectious disease; or catastrophic acts of nature, including, but not limited to, fire, flood, earthquake, wind, storm, or

wave action, or any other occurrence which warrants the declaration of a state of emergency or disaster by the Governor pursuant to Code Section 38-3-51 or by a federal agency shall not be civilly liable to any natural person receiving such assistance as a result of any act or omission in rendering such service if such natural person, association, organization, or entity was acting in good faith and unless the damage or injury was caused by the willful or wanton negligence or misconduct of such natural person, association, organization, or entity. Nothing in this Code section shall be construed to amend, repeal, alter, or affect in any manner any other provision of law granting immunity or limiting liability. Nothing in this Code section shall be construed to abrogate the sovereign immunity of this state as to all actions executed by any party under this Code section. (Code 1981, § 51-1-29.2, enacted by Ga. L. 1995, p. 954, § 1; Ga. L. 2008, p. 1199, § 8/HB 89.)

The 2008 amendment, effective July 1, 2008, rewrote this Code section.

Editor's notes. — Ga. L. 2008, p. 1199, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Business Security and Employee Privacy Act.'"

Law reviews. — For article, "Georgia's 'Bring Your Gun to Work' Law May Not Have the Firepower to Trouble Georgia Employers After All," see 14 (No. 7) Ga. State Bar J. 12 (2009).

51-1-29.3. Immunity for operators of external defibrillators.

(a) The persons described in this Code section shall be immune from civil liability for any act or omission to act related to the provision of emergency care or treatment by the use of or provision of an automated external defibrillator, as described in Code Sections 31-11-53.1 and 31-11-53.2, except that such immunity shall not apply to an act of willful or wanton misconduct and shall not apply to a person acting within the scope of a licensed profession if such person acts with gross negligence. The immunity provided for in this Code section shall extend to:

(1) Any person who gratuitously and in good faith renders emergency care or treatment by the use of or provision of an automated external defibrillator without objection of the person to whom care or treatment is rendered;

(2) The owner or operator of any premises or conveyance who installs or provides automated external defibrillator equipment in or on such premises or conveyance;

(3) Any physician or other medical professional who authorizes, directs, or supervises the installation or provision of automated external defibrillator equipment in or on any premises or conveyance other than any medical facility as defined in paragraph (5) of Code Section 31-7-1; and

(4) Any person who provides training in the use of automated external defibrillator equipment as required by subparagraph (b)(1)(A) of Code Section 31-11-53.2, whether compensated or not. This Code section is not applicable to any training or instructions provided by the manufacturer of the automated external defibrillator or to any claim for failure to warn on the part of the manufacturer.

(b) Nothing in this Code section shall be construed so as to provide immunity to the manufacturer of any automated external defibrillator or off-premises automated external defibrillator maintenance or service providers, nor shall it relieve the manufacturer from any claim for product liability or failure to warn. (Code 1981, § 51-1-29.3, enacted by Ga. L. 2001, p. 776, § 2; Ga. L. 2002, p. 415, § 51; Ga. L. 2008, p. 12, § 2-37/SB 433.)

Effective date. — This Code section became effective July 1, 2001.

The 2002 amendment, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, substituted "Code Section 31-11-53.2" for "Code Section 31-11-53.1" in paragraph (a)(4).

The 2008 amendment, effective July 1, 2009, substituted "paragraph (5)" for "paragraph (2)" near the end of paragraph (a)(3).

Cross references. — Automated external defibrillator required in schools, § 20-2-775.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2001, the subsection designations were added.

Law reviews. — For note on the 2001 enactment of this Code section, see 18 Ga. St. U.L. Rev. 146 (2001).

51-1-29.4. Liability of voluntary health care providers and sponsoring organizations; cumulative immunity; application.

(a) As used in this Code section, the term:

(1) "Free health clinic" means a nonprofit, charitable, or eleemosynary institution or organization which voluntarily and without expectation or receipt of payment or other compensation or financial benefit provides health care services to persons who do not qualify for medicare or Medicaid, have no private health insurance, and cannot afford to see a medical care professional.

(2) "Medical care professional" means a professional who is licensed under Chapter 4 of Title 26 or Chapter 9, 11, 11A, 26, 30, 33, 34, or 44 of Title 43.

(b)(1) A free health clinic and its agents, employees, and volunteers when acting within the scope of that relationship shall not be liable to a patient for ordinary negligence which proximately causes injury to or the death of that patient if the services provided to that patient were free of any charge and the free health clinic and the medical care professional whose services are at issue neither received nor expected

to receive any payment or other compensation or financial benefit for providing care to that patient.

(2) A licensed hospital, public school, or nonprofit organization which requests, sponsors, or participates in providing the services of a free health clinic shall not be liable to a patient for ordinary negligence which proximately causes injury to or the death of that patient if the services requested, sponsored, or provided to that patient were free of any charge and the free health clinic, the medical care professional whose services are at issue, the licensed hospital, the public school, or the nonprofit organization did not receive or expect to receive any payment or other compensation or financial benefit for providing care to that patient.

(3) The immunity granted under this Code section shall not waive or affect and is cumulative of any existing immunity from any other source.

(c) This Code section shall apply only to causes of action arising on or after July 1, 2004. (Code 1981, § 51-1-29.4, enacted by Ga. L. 2004, p. 446, § 1; Ga. L. 2005, p. 60, § 51/HB 95.)

Effective date. — This Code section became effective July 1, 2004.

The 2005 amendment, effective April 7, 2005, part of an Act to revise, modernize, and correct the Code, substituted "As used in" for "For purposes of" at the beginning of subsection (a).

Cross references. — Care and protection of indigent and elderly patients, T. 31, C. 8. "Health Share" volunteers in medicine, T. 31, C. 8, A. 8.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2004, this Code Section enacted as Code Section 51-1-29.15 was redesignated as Code Section 51-1-29.4.

51-1-29.5. Definitions; limitation on health care liability claim to gross negligence in emergency medical care; factors for jury consideration.

(a) As used in this Code section, the term:

(1) "Affiliate" means a person who, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with a specified person, including any direct or indirect parent or subsidiary.

(2) "Claimant" means a person, including a decedent's estate, who seeks or has sought recovery of damages in a health care liability claim. All persons claiming to have sustained damages as the result of the bodily injury or death of a single person are considered a single claimant.

(3) "Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies

of the person, whether through ownership of equity or securities, by contract, or otherwise.

(4) "Court" means any federal or state court.

(5) "Emergency medical care" means bona fide emergency services provided after the onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. The term does not include medical care or treatment that occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient or care that is unrelated to the original medical emergency.

(6) "Emergency medical services provider" means any person providing emergency medical care.

(7) "Health care" means any act or treatment performed or furnished, or that should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement.

(8) "Health care institution" means:

(A) An ambulatory surgical center;

(B) A personal care home licensed under Chapter 7 of Title 31;

(B.1) An assisted living community licensed under Chapter 7 of Title 31;

(C) An institution providing emergency medical services;

(D) A hospice;

(E) A hospital;

(F) A hospital system;

(G) An intermediate care facility for the mentally retarded; or

(H) A nursing home.

(9) "Health care liability claim" means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, health care, or safety or professional or administrative services directly related to health care, which departure from standards proximately results in injury to or death of a claimant.

(10) "Health care provider" means:

(A) Any person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Georgia to provide health care, including but not limited to:

(i) A registered nurse;

(ii) A dentist;

(iii) A podiatrist;

(iv) A pharmacist;

(v) A chiropractor;

(vi) An optometrist; or

(vii) A health care institution; and

(B) Any person who is:

(i) An officer, director, shareholder, member, partner, manager, owner, or affiliate of a health care provider or physician; or

(ii) An employee, independent contractor, or agent of a health care provider or physician acting in the course and scope of the employment or contractual relationship.

(11) "Hospice" means a facility licensed as such under the "Georgia Hospice Law," Article 9 of Chapter 7 of Title 31.

(12) "Hospital" means a facility licensed as such under Chapter 7 of Title 31.

(13) "Hospital system" means a system of hospitals located in this state that are under the common governance or control of a corporate parent.

(14) "Medical care" means any act defined as the practice of medicine under Code Section 43-34-21.

(15) "Nursing home" means a facility licensed as such under Chapter 7 of Title 31.

(16) "Pharmacist" means a person licensed as such under Chapter 4 of Title 26.

(17) "Physician" means an individual licensed to practice medicine in this state, a professional association organized by an individual physician or group of physicians, or a partnership or limited liability partnership formed by a group of physicians.

(18) "Professional or administrative services" means those duties or services that a physician or health care provider is required to provide as a condition of maintaining the physician's or health care

provider's license, accreditation status, or certification to participate in state or federal health care programs.

(b) Any legal term or word of art used in this chapter, not otherwise defined in this chapter, shall have such meaning as is consistent with the common law.

(c) In an action involving a health care liability claim arising out of the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department, no physician or health care provider shall be held liable unless it is proven by clear and convincing evidence that the physician or health care provider's actions showed gross negligence.

(d) In an action involving a health liability claim arising out of the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department, the court shall instruct the jury to consider, together with all other relevant matters:

(1) Whether the person providing care did or did not have the patient's medical history or was able or unable to obtain a full medical history, including the knowledge of preexisting medical conditions, allergies, and medications;

(2) The presence or lack of a preexisting physician-patient relationship or health care provider-patient relationship;

(3) The circumstances constituting the emergency; and

(4) The circumstances surrounding the delivery of the emergency medical care. (Code 1981, § 51-1-29.5, enacted by Ga. L. 2005, p. 1, § 10/SB 3; Ga. L. 2009, p. 859, § 16/HB 509; Ga. L. 2011, p. 227, § 29/SB 178.)

Effective date. — This Code section became effective February 16, 2005.

The 2009 amendment, effective July 1, 2009, substituted "Code Section 43-34-21" for "Code Section 43-34-20" at the end of paragraph (a)(14).

The 2011 amendment, effective July 1, 2011, added subparagraph (a)(8)(B.1).

Editor's notes. — Ga. L. 2005, p. 1, § 1, not codified by the General Assembly, provides that: "The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of

health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act."

Ga. L. 2005, p. 1, § 14, not codified by the General Assembly, provides for severability.

Ga. L. 2005, p. 1, § 15(b), not codified by the General Assembly, provides that this Code section shall apply only with respect to causes of action arising on or after February 16, 2005, and any prior causes of action shall continue to be governed by prior law.

Law reviews. — For article on 2005 enactment of this Code section, see 22 Ga. St. U.L. Rev. 221 (2005). For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010). For article, "State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 51-1-29.5(c) does not violate the uniformity provision of the Georgia Constitution, Ga. Const. 1983, Art. III, Sec. VI, Para. IV(a), because it is a general law; it operates uniformly upon all health care liability claims arising from emergency medical care, and classification of the designated class is neither arbitrary nor unreasonable. Gliemmo v. Cousineau, 287 Ga. 7, 694 S.E.2d 75 (2010).

Because the legislative purpose of O.C.G.A. § 51-1-29.5(c) is legitimate, and the classification drawn has some reasonable relation to furthering that purpose, the classification passes constitutional muster, and, although § 51-1-29.5(c) raises the burden of proof in certain cases, it does not deprive one of the right to a jury trial or any other fundamental right. Promoting affordable liability insurance for health care providers and hospitals, and thereby promoting the availability of quality health care services, are legitimate legislative purposes, and it is entirely logical to assume that emergency medical care provided in hospital emergency rooms is different from medical care provided in other settings and that establishing a standard of care and a burden of proof that reduces the potential liability of the providers of such care will help achieve those legitimate legislative goals. Gliemmo v. Cousineau, 287 Ga. 7, 694 S.E.2d 75 (2010).

O.C.G.A. § 51-1-29.5(c) satisfies due process requirements because it is not so vague and indefinite in its meaning that persons of ordinary intelligence must necessarily guess at its meaning and differ as to its application. Gliemmo v. Cousineau, 287 Ga. 7, 694 S.E.2d 75 (2010).

Question as to whether delay in treatment constituted emergency medical care. — In a medical malpractice action, the trial court's grant of the defendants' motion for summary judgment was erroneous because, although the evidence reflected that the patient presented to the emergency room with an emergency condition, a question of fact existed as to whether the defendants' actions in delaying necessary treatment constituted emergency medical care under O.C.G.A. § 51-1-29.5(c). Dailey v. Abdul-Samed, 319 Ga. App. 380, 736 S.E.2d 142 (2012).

No evidence emergency room physician acted with gross negligence. — A patient sued an emergency room physician for malpractice for failing to diagnose a leg fracture. As the physician sought no orthopedic consult because a radiologist opined that the x-rays showed no serious fracture, the patient could not prove by clear and convincing evidence that the physician acted with gross negligence, as required under O.C.G.A. § 51-1-29.5(c); thus, the physician was entitled to summary judgment. Pottinger v. Smith, 293 Ga. App. 626, 667 S.E.2d 659 (2008).

Delay in seeking specialist despite presence in emergency room. — Defendants were not entitled to summary judgment in a medical malpractice action because there were factual questions as to

the defendant's actions during the time the patient remained in the emergency room; the mere fact that the patient remained in the emergency department while the defendants allegedly delayed in transferring the patient to a hand surgeon did not automatically shield the defendants from liability under O.C.G.A. § 51-1-29.5(c). Dailey v. Abdul-Samed, No. A12A1109, 2012 Ga. App. LEXIS 1002 (Nov. 28, 2012).

Even assuming there was evidence sufficient to create a jury issue as to whether the doctor's actions were negligent, there was no evidence, and certainly no clear and convincing evidence, by which a jury could reasonably conclude that the doctor failed to exercise even slight care and was therefore grossly negligent. Johnson v. Omondi, 318 Ga. App. 787, 736 S.E.2d 129 (2012).

51-1-30. Liability of officers and agents for acts performed while fighting fires or performing duties at the scene of emergencies.

JUDICIAL DECISIONS

Firefighters' immunity. — Trial court properly granted summary judgment to three firefighters on the widow's wrongful death action against them for the death of decedent while decedent tried to rescue a fisherman whose canoe capsized at a lake, which was an incident the firemen were called to, as the lack of evidence of the three firefighters' wilful negligence and malfeasance meant they were entitled to immunity under O.C.G.A. § 51-1-30(b). Robinson v. DeKalb County, 261 Ga. App. 163, 582 S.E.2d 156 (2003).

51-1-30.4. Immunity from liability for officers providing security at nuclear facilities.

Notwithstanding any other provision of law, an authorized security officer as provided for in Code Section 16-11-124 acting within the scope of his or her official duties on the premises of a federally licensed nuclear power facility or the properties adjacent to the facility pursuant to a written agreement entered into with the local law enforcement agency having jurisdiction over the facility shall be entitled to immunity as provided in Code Section 51-11-9. Such officer and the officer's employer or the owner, operator, or licensee of the facility where the officer is providing security services shall also be immune from liability for the officer's good faith performance of his or her duties at such facility in accordance with a nuclear security plan approved by the United States Nuclear Regulatory Commission or other authorized federal agency. (Code 1981, § 51-1-30.4, enacted by Ga. L. 2006, p. 812, § 5/SB 532.)

Effective date. — This Code section became effective May 3, 2006.

Editor's notes. — Ga. L. 2006, 812, § 5, not codified by the General Assembly, provides that: "this Act shall apply only with respect to causes of action arising on or after the effective date of this Act."

51-1-32. Separate causes of action for personal injury and property damage caused by motor vehicle.

Cross references. — Settlement offers and agreement for personal injury, bodily injury, and death from motor vehicle, § 9-11-67.1.

JUDICIAL DECISIONS

Applicability. — When an insured brought a counterclaim for property damage against a tortfeasor but later withdrew it, the insurer could not seek to reassert that claim under O.C.G.A. § 51-1-32, allowing the splitting of personal injury and property damage claims, in a subsequent action, because the insured's only claim was for property damage. Allstate Ins. Co. v. Welch, 259 Ga. App. 71, 576 S.E.2d 57 (2003).

51-1-36. Duty of care of operator of motor vehicle to passengers.

Cross references. — Settlement offers and agreement for personal injury, bodily injury, and death from motor vehicle, § 9-11-67.1.

51-1-37. Negligent or improper administration of polygraph examination; measure of damages.

(a) Any person who is given a polygraph examination and who suffers damages as a result of such polygraph examination having been administered in a negligent manner shall have a cause of action against the polygraph examiner.

(b) The measure of damages shall be the actual damages sustained by such person, together with reasonable attorneys' fees, filing fees, and reasonable costs of the action. Reasonable costs of the action may include, but shall not be limited to, the expenses of discovery and document reproduction. Damages may include, but shall not be limited to, back pay for the period during which such person did not work or was denied a job as a result of such examination. (Code 1981, § 51-1-37, enacted by Ga. L. 1985, p. 1008, § 2; Ga. L. 2001, p. 1035, § 1.)

The 2001 amendment, effective July 1, 2001, in subsection (a), deleted the colon at the end of the former introductory language of subsection (a), deleted the paragraph designation of former paragraph (a)(1), substituted "such" for "Such", deleted "; or" following "manner", and deleted former paragraph (a)(2), which read: "Such polygraph examination having not been administered in conformity with the provisions of Chapter 36 of Title 43".

Cross references. — Victim's right to refuse request for polygraph examinations or other truth-telling devices, § 17-5-73.

Law reviews. — For note on the 2001 amendment to this Code section, see 18 Ga. St. U.L. Rev. 331 (2001).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Reliability of Polygraph Examination, 14 POF2d 1.

Am. Jur. Trials. — Uses, Techniques, and Reliability of Polygraph Testing, 42 Am. Jur. Trials 313.

51-1-40. Liability for acts of intoxicated persons.

Law reviews. — For survey article on tort law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 425 (2003). For annual survey of tort law, see 57 Mercer L. Rev. 363 (2005). For survey article on tort law, see 60 Mercer L. Rev. 375 (2008). For annual survey of law on torts, see 62 Mercer L. Rev. 317 (2010).

JUDICIAL DECISIONS

Construction with O.C.G.A. § 51-1-18(a). — Trial court erroneously denied a motion to dismiss a personal injury action filed by two parents against two social hosts, arising out the death of the parents' 20-year-old daughter, which alleged that the social hosts served the daughter alcohol, and the daughter died when the daughter drunkenly drove into a tree after leaving the social hosts' home, as the action was barred due to the fact that the daughter had already reached the age of majority at the time of the accident; moreover, because the daughter could not recover from the social hosts, neither could the parents recover under a wrongful death theory. Penny v. McBride, 282 Ga. App. 590, 639 S.E.2d 561 (2006), cert. denied, 2007 Ga. LEXIS 223 (Ga. 2007).

Construction with O.C.G.A. § 51-12-5.1. — Punitive damages are not authorized against a server of alcohol under O.C.G.A. § 51-12-5.1(f). O.C.G.A. § 51-12-5.1(f) provides that if the defendant acted or failed to act while under the influence of alcohol, there shall be no limitation regarding the amount which may be awarded as punitive damages against such an active tortfeasor; however, such damages shall not be the liability of any defendant other than an active tortfeasor, that is, the defendant acting under the influence of alcohol. Capp v. Carlito's Mexican Bar & Grill #1, Inc., 288 Ga. App. 779, 655 S.E.2d 232 (2007), cert. denied, 2008 Ga. LEXIS 317 (Ga. 2008).

Statute applies to convenience stores. — Because O.C.G.A. § 51-1-40 uses the terms "sells, furnishes, or serves" alcohol in the disjunctive, it is clear that the statute was intended to encompass the sale of an alcoholic beverage at places other than the proverbial dram shop; the statutory requirements of the Dram Shop Act, § 51-1-40, are straightforward and under the plain language of the statute are equally applicable to convenience stores and traditional dram shops. Flores v. Exprezit! Stores 98-Georgia, LLC, 289 Ga. 466, 713 S.E.2d 368 (2011).

When a convenience store sells alcoholic beverages to a customer the store will often have an opportunity to observe how the customer arrived and, conversely, the manner in which he or she will depart and, thus, a convenience store may very well know if a customer will soon be driving a motor vehicle and does have an opportunity to observe the customer to determine if he or she appears to be noticeably intoxicated; if a plaintiff cannot demonstrate the convenience store knowingly sold alcoholic beverages to a noticeably intoxicated person who would soon be driving a motor vehicle, the convenience store would be entitled to summary judgment, and this is not to say that the Dram Shop Act, O.C.G.A. § 51-1-40, cannot be applied to sales made by convenience stores as a matter of law, but each case must rise or fall on the case's own facts. Flores v. Exprezit! Stores 98-Georgia, LLC, 289 Ga. 466, 713 S.E.2d 368 (2011).

Knowledge of a convenience store. — Dram Shop Act, O.C.G.A. § 51-1-40, does not require the seller of alcoholic beverages to know when or how much alcohol a purchaser will consume before

the purchaser gets behind the wheel; the focus should be solely on a convenience store's knowledge as to whether the store's customer was noticeably intoxicated and would be driving soon because if a convenience store sells alcohol to such a customer, it is foreseeable that the customer will drive while intoxicated and injure an innocent third party, and if the plaintiff can prove that such sale of alcohol was a proximate cause of any injuries, the convenience store will be held liable under O.C.G.A. § 51-1-40(b). Flores v. Exprezit! Stores 98-Georgia, LLC, 289 Ga. 466, 713 S.E.2d 368 (2011).

Exclusive remedy for claims based on furnishing alcohol.

Because O.C.G.A. § 51-1-40(b) afforded plaintiff an exclusive remedy against defendant tavern for damages arising from an accident caused by an employee of defendant, the trial court correctly granted summary judgment to defendant on claim based on common law general negligence principles. Hulsey v. Northside Equities, Inc., 249 Ga. App. 474, 548 S.E.2d 41 (2001).

Duty imposed on alcohol providers to protect third parties by not serving intoxicated patrons could not likewise be imposed on doctors treating patients, and, thus, the doctor did not owe a duty to decedent based on the doctor's provision of a medical certificate to the truck driver that the truck driver was physically fit to drive a commercial vehicle, in a case where the truck driver died of preexisting coronary disease three months after receiving the certificate while driving a truck and the truck then struck decedent's vehicle and killed the decedent. The doctor did not have any legal authority to restrain the truck driver for the benefit of the public, and, therefore, owed no duty to the decedent to not have provided the certificate to the truck driver. Houston v. Bedgood, 263 Ga. App. 139, 588 S.E.2d 437 (2003).

This section did not apply, etc.

Where evidence showed that the deceased was not driving when the deceased fell out of the jeep, the statutory exception to the common law rule did not apply. Lumpkin v. Mellow Mushroom, 256 Ga. App. 83, 567 S.E.2d 728 (2002).

Health care providers. — Physician who administered medication to a patient who later was involved in an automobile accident was not under a duty similar to that imposed on providers of alcohol under O.C.G.A. §§ 51-1-40 and 3-3-22, as requiring health care providers to consider the risk of harm to third persons before prescribing medication would have been inconsistent with the physician-patient relationship. Shortnacy v. North Atl. Internal Med., P.C., 252 Ga. App. 321, 556 S.E.2d 209 (2001).

No liability for departing passengers.

Intermediate court erred in reinstating an injured party's Georgia Dram Shop Act, O.C.G.A. § 51-1-40, claim against an airline as the Georgia General Assembly intended to abrogate the common law principle that the negligent driver was the sole proximate cause of injuries resulting from an inebriated condition only in the limited case of a traditional land-based supplier of the alcohol. Delta Airlines, Inc. v. Townsend, 279 Ga. 511, 614 S.E.2d 745 (2005).

Knowledge cannot be imputed to hosts. — Trial court properly granted the hosts' motion for summary judgment in an injured party's action under the Georgia Dram Shop Act, O.C.G.A. § 51-1-40(b), where: (1) the intoxicated driver's brother testified that the driver was not noticeably intoxicated at the party; (2) at the request of the driver's brother, the driver agreed to stay with the hosts after the party because the driver had been drinking; and (3) because there was direct evidence that the driver agreed not to drive soon, contrary knowledge could not be imputed to the hosts. Hodges v. Erickson, 264 Ga. App. 516, 591 S.E.2d 360 (2003).

Restraint of intoxicated person not required. — Nothing in this section or any other provision of Georgia law mandates that a provider of alcoholic beverages must prevent an intoxicated person from driving. Armstrong v. State, 244 Ga. App. 871, 537 S.E.2d 147 (2000).

Employer not liable. — Former employer was not liable to a former employee for injuries from an attack by the employee's former love interest, who was the employer's sole owner, after the former

love interest became intoxicated at a company party, because the injuries were not the result of a vehicular accident caused by the employer's serving alcohol to a noticeably intoxicated person. Solley v. Mullins Trucking Co., 301 Ga. App. 565, 687 S.E.2d 924 (2009).

Trial court erred in denying an employer's motion for summary judgment in a guest's action to recover damages for injuries the guest sustained when an employee and an unidentified person assaulted the guest at a private party because O.C.G.A. § 51-1-40 foreclosed the guest's theory that the employer was negligent on the ground that the employer sponsored a party at which unlimited alcohol was served and that the service of alcohol to partygoers was a proximate cause of the guest's injuries; to the extent that the guest's assailants were intoxicated at the time of the assault and that the intoxication contributed to the assault, it was the assailants' consumption of alcohol, not the service of alcohol to the assailants', that could have been the proximate cause of the guest's injuries. B-T Two, Inc. v. Bennett, 307 Ga. App. 649, 706 S.E.2d 87 (2011).

Requirement of noticeable intoxication. — A defendant will not be liable for serving alcohol unless the consumer of the alcohol is noticeably intoxicated when served. Thus, plaintiff's evidence regarding the employee's level of intoxication, taken together with expert testimony that such a level of intoxication would produce manifestations of intoxication, was sufficient to create a question of fact as to whether the employee was noticeably intoxicated at work where the drinking was occurring and, thereby, to avoid summary judgment. Northside Equities, Inc. v. Hulsey, 275 Ga. 364, 567 S.E.2d 4 (2002).

Summary judgment for a country club in an injured driver's suit under the Georgia Dram Shop Act was affirmed where: (1) the admission of an additional statement, which the driver contended was not inadmissible hearsay, would not have changed the result; (2) the unrebutted evidence was that the country club did not serve alcoholic beverages to the tortfeasor while the tortfeasor was noticeably intoxicated or knew that the tortfeasor would be driving soon; and (3) the driver did not present any expert testimony to supplement the evidence of the tortfeasor's post-death blood alcohol level or to explain the liquid found in the tortfeasor's alimentary tract. Wright v. Pine Hills Country Club, 261 Ga. App. 748, 583 S.E.2d 569 (2003).

A trial court erred by granting summary judgment in favor of a restaurant in a negligence suit brought against it pursuant to Georgia's Dram Shop Act, O.C.G.A. § 51-1-40(b), wherein an adoptive parent brought suit to recover damages for personal injuries to a child who was injured in a motor vehicle accident in a vehicle driven by the intoxicated biological parent of the child, as the record revealed conflicting evidence on the issue as to whether the driving parent was noticeably intoxicated at the time of last service at the restaurant. As a result, the conflicting evidence was sufficient to have created a question of fact for a jury to determine, thereby making summary disposition of the matter inappropriate. Capp v. Carlito's Mexican Bar & Grill #1, Inc., 288 Ga. App. 779, 655 S.E.2d 232 (2007), cert. denied, 2008 Ga. LEXIS 317 (Ga. 2008).

Liability properly established despite default judgment. — In a wrongful death action, the trial court did not err by entering a judgment against the defendant as to liability even though it was in default because the facts as alleged in the complaint, together with the fair inferences and conclusions of fact to be drawn from those allegations, supported a claim against the defendant under the Dram Shop Act, O.C.G.A. § 51-1-40 et seq. Freese II, Inc. v. Mitchell, 318 Ga. App. 662, 734 S.E.2d 491 (2012).

Evidence.

An employer was entitled to summary judgment where uncontroverted evidence demonstrated that its employee, who was involved in an automobile collision, did not appear to be in a state of noticeable intoxication while at the employer's annual holiday luncheon prior to the accident. Birnbrey, Minsk & Minsk, LLC v. Yirga, 244 Ga. App. 726, 535 S.E.2d 792 (2000).

Trial court erred in granting summary judgment against plaintiff's claim under

O.C.G.A. § 51-1-40(b) because scientific evidence of the driver's blood alcohol level created a genuine issue of material fact on the crucial issue of whether the driver was noticeably intoxicated at the time the driver was served a last drink by defendant tavern. Hulsey v. Northside Equities, Inc., 249 Ga. App. 474, 548 S.E.2d 41 (2001).

Summary judgment was properly granted dismissing motorists' suit against a restaurant under the Dram Shop Act, O.C.G.A. § 51-1-40(b), for injuries sustained in a collision with one of the restaurant's patrons because the evidence did not present a question of fact as to whether the restaurant knew that the patron would be driving soon after leaving the premises. Sugarloaf Cafe, Inc. v. Willbanks, 279 Ga. 255, 612 S.E.2d 279 (2005).

Trial court erred in denying a homeowner's motion for summary judgment in a dram shop action filed by a decedent's estate because the homeowner showed that: (1) there was no evidence in the record that, when a guest was in a state of noticeable intoxication, the homeowner knowingly furnished alcoholic beverages to the guest; and (2) after the guest's intoxication became apparent, the homeowner expressed concern that the guest not drive until the guest became sober, urged the guest to stay and rest as long as necessary, and offered to drive the guest home if the guest could not wait; because there was no evidence that the homeowner knew or should have known that the guest consumed additional alcoholic beverages after the guest became noticeably intoxicated, there was no record evidence that the homeowner knowingly furnished or served alcoholic beverages to a noticeably intoxicated guest. Shin v. Estate of Camacho, 302 Ga. App. 243, 690 S.E.2d 444, cert. denied, No. S10C0965, 2010 Ga. LEXIS 528 (Ga. 2010).

Circumstantial evidence sufficient to create issue of fact regarding purchase of alcoholic beverages in store. — Grant of summary judgment was reversed because direct evidence that the driver entered the store and shortly thereafter exited the store carrying packaged beer was circumstantial evidence that the driver purchased the beer in the store, and that circumstantial evidence pointed more strongly to a conclusion opposite to the direct testimony from the store employee that there was no sale of beer. Flores v. Exprezit! Stores 98-Georgia, LLC, 314 Ga. App. 570, 724 S.E.2d 870 (2012).

Knowledge of driving required. — Trial court should have granted summary judgment in favor of the bar in the passenger's Georgia Dram Shop Act, O.C.G.A. § 51-1-40, case; there was no evidence that the bar's employees should have known that the bar patron would be driving soon, there was no evidence that the patron had displayed the patron's keys or that the employees were familiar enough with the patron to know that the patron would be driving, and the fact that most patrons drove to the bar was insufficient to show that the server knew the patron would soon be driving. Becks v. Pierce, 282 Ga. App. 229, 638 S.E.2d 390 (2006), cert. denied, 2007 Ga. LEXIS 154 (2007).

Spoliation of evidence. — Given proof of spoliation under former O.C.G.A. § 24-2-22, in an action filed against a tavern pursuant to Georgia's Dram Shop Act, O.C.G.A. § 51-1-40(b), the trial court erred in granting summary judgment to an injured party's guardian, as the tavern's manager was aware of the potential for litigation and failed to preserve whatever videotaped evidence might have been captured as to whether one of the tavern's intoxicated patron's would soon be driving; hence, a rebuttable presumption arose against the tavern that the evidence destroyed would have been harmful to the tavern, rendering summary judgment inappropriate. Baxley v. Hakiel Indus., 282 Ga. 312, 647 S.E.2d 29 (2007).

No liability based solely upon tortfeasor's subsequent guilty plea. — Tortfeasor's guilty plea to driving under the influence did not, by itself, make the homeowners, who had a party where the tortfeasor was not an invited guest, liable for the injuries sustained in the subsequent car accident. Erickson v. Hodges, 257 Ga. App. 144, 570 S.E.2d 420 (2002).

Adoptive parent's ability to recover medical expenses of child. — In a suit

brought by an adoptive parent of a child pursuant to Georgia's Dram Shop Act, O.C.G.A. § 51-1-40, the adoptive parent was not entitled to recover for medical expenses incurred prior to the time that the child was adopted as the action to recover for a child's medical expenses does not become vested in the adopting parent until after the adoption becomes final. That a Medicaid lien may have been imposed upon any recovery that was obtained by the child did not alter the decision. Capp v. Carlito's Mexican Bar & Grill #1, Inc., 288 Ga. App. 779, 655 S.E.2d 232 (2007), cert. denied, 2008 Ga. LEXIS 317 (Ga. 2008).

Cited in La Cosecha, Inc. v. Hall, 246 Ga. App. 441, 540 S.E.2d 659 (2000); Powell v. Alan Young Homes, Inc., 251 Ga. App. 72, 554 S.E.2d 186 (2001).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Negligent Failure to Detain Intoxicated Motorist, 1 POF3d 545.

Liability of Social Host for Negligent Driving of Intoxicated Adult Guest, 3 POF3d 697.

Am. Jur. Trials. — Dram Shop Litigation, 12 Am. Jur. Trials 729.

Liquor Provider Liability, 43 Am. Jur. Trials 527.

51-1-41. Liability of sports officials at amateur athletic contests.

Law reviews. — For article, "Appellate Practice and Procedure," see 63 Mercer L. Rev. 67 (2011).

JUDICIAL DECISIONS

City track coach not grossly negligent. — Volunteer track and field coach was immune from liability under O.C.G.A. § 51-1-41(a) for alleged negligence in placing a barrier at the end of a long jump runway for children in a city recreational program to jump over. The coach's actions did not rise to the level of gross negligence under § 51-1-41(c) as a matter of law. Heard v. City of Villa Rica, 306 Ga. App. 291, 701 S.E.2d 915 (2010).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — School's Failure to Maintain Children's Play Area Properly, 9 POF2d 729.

Sport Injury — Negligence, 15 POF2d 1.

Playground Accidents — Human Impact Tolerance, 21 POF2d 701.

Negligent Operation or Public Swimming Pool, 34 POF2d 63.

Inadequate Protection of Spectator at Sporting Event, 45 POF2d 407.

Liability for Trampoline Injury, 45 POF2d 469.

Assumption of Risk Defense in Sports or Recreation Injury Cases, 30 POF3d 161.

Liability for Errant Golf Ball Shots, 31 POF3d 87.

Negligent Operation of Gymnasium, Health Club, or Similar Facility, 40 POF3d 111.

51-1-43. "Roller Skating Safety Act of 1993."

JUDICIAL DECISIONS

Owners of skating rink entitled to summary judgment. — Because a skating rink patron failed to present sufficient evidence showing that the rink owners breached a duty by failing to have identifiable floor guards on duty at the time of the patron's fall, and that the breach proximately caused the patron's injuries, but instead, the unequivocal evidence showed that a floor guard was on duty at that time of the fall, the trial court properly granted summary judgment to the owners as to the issue of their liability. Moreover, testimony from other management personnel, who were not at the rink at the time of the fall, did not contradict the assistant manager's positive assertions or written report and did not create a material issue of fact. Evans v. Sparkles Mgmt., LLC, 290 Ga. App. 458, 659 S.E.2d 860 (2008).

51-1-50. Immunity of broadcasters from liability for Levi's Call: Georgia's Amber Alert Program.

(a) As used in this Code section, the term:

(1) "Broadcast" means the transmission of video or audio programming by an electronic or other signal conducted by radiowaves or microwaves, by wires, lines, coaxial cables, wave guides or fiber optics, by satellite transmissions directly or indirectly to viewers or listeners, or by any other means of communication.

(2) "Broadcaster" means any corporation or other entity that is engaged in the business of broadcasting video or audio programming, whether through the public airwaves, by cable, by direct or indirect satellite transmission, or by any other means of communication.

(3) "Levi's Call: Georgia's Amber Alert Program" means the voluntary program entered into by the Georgia Bureau of Investigation, the Georgia Emergency Management Agency, the Georgia Association of Broadcasters, and certain broadcasters licensed to serve in the State of Georgia, which program provides that if the Georgia Bureau of Investigation verifies that a child has been abducted and is in danger, an alert containing known details of the abduction is transmitted to the Georgia Emergency Management Agency, which is then transmitted by the Georgia Emergency Management Agency to broadcasters in Georgia; and those broadcasters participating in the program then broadcast or otherwise disseminate the alert to listeners, viewers, or subscribers.

(b) Any broadcaster participating in Levi's Call: Georgia's Amber Alert Program shall not be liable for any civil damages arising from the broadcast or other dissemination of any alert generated pursuant to the Levi's Call: Georgia's Amber Alert Program. The immunity provided for in this Code section shall apply to any broadcast or dissemination of information that is substantially consistent with the information trans-

mitted by the Georgia Emergency Management Agency and that takes place during an alert requested by the Georgia Emergency Management Agency and for a period of two hours after such alert has ended or the Georgia Emergency Management Agency informs the participating broadcasters that the alert has changed in content.

(c) Nothing in this Code section shall be construed to limit or restrict in any way any legal protection a broadcaster may have under any other law for broadcasting or otherwise disseminating any information. (Code 1981, § 51-1-50, enacted by Ga. L. 2004, p. 56, § 1; Ga. L. 2005, p. 60, § 51/HB 95.)

Effective date. — This Code section became effective April 9, 2004.

The 2005 amendment, effective April 7, 2005, part of an Act to revise, modernize, and correct the Code, revised punctuation in paragraphs (a)(1) and (a)(2).

Cross references. — Kidnapping, § 16-5-40. Interference with custody, § 16-5-45.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2004, "Georgia," was substituted for "Georgia;" and "the" was inserted preceding "Georgia Emergency Management Agency" in two places in paragraph (a)(3).

Law reviews. — For annual survey of law of torts, see 56 Mercer L. Rev. 415 (2004). For annual survey of law of torts, see 56 Mercer L. Rev. 433 (2004).

51-1-51. Limitations on liability of liquefied petroleum gas providers.

(a) As used in this Code section, the term:

(1) "Liquefied petroleum gas equipment" means a liquefied petroleum gas appliance or liquefied petroleum gas equipment.

(2) "Liquefied petroleum gas provider" means any person or entity engaged in the business of supplying, handling, transporting, or selling at retail liquefied petroleum gas in this state.

(b) A liquefied petroleum gas provider shall be immune from civil liability if the proximate cause of the injury or damages was:

(1) An alteration, modification, or repair of liquefied petroleum gas equipment that could not have been discovered by the liquefied petroleum gas provider in the exercise of reasonable care; or

(2) The use of liquefied petroleum gas equipment in a manner or for a purpose other than that for which the liquefied petroleum gas equipment was intended to be used or for which could reasonably have been foreseen, provided that the liquefied petroleum gas provider or the manufacturer of the liquefied petroleum gas equipment has taken reasonable steps to warn the ultimate consumer of the hazards associated with foreseeable misuses of the liquefied petroleum gas equipment.

(c) Nothing in this Code section shall be construed as affecting, modifying, or eliminating the liability of a manufacturer of liquefied petroleum gas equipment or its employees or agents under any legal claim, including but not limited to product liability claims.

(d) This Code section shall apply to any cause of action arising on or after July 1, 2005. (Code 1981, § 51-1-51, enacted by Ga. L. 2005, p. 1177, § 1/SB 139.)

Effective date. — This Code section became effective July 1, 2005.

51-1-52. Federal law payor guidelines and criteria not a legal basis for negligence or standard of care for medical malpractice or product liability.

(a) As used in this Code section, the term:

(1) "Criteria" means criteria relating to administrative procedures and shall not include criteria relating to medical treatment, quality of care, or best practices.

(2) "Guideline" means a guideline relating to administrative procedures and shall not include guidelines relating to medical treatment, quality of care, or best practices.

(3) "Payor" means any insurer, health maintenance organization, self-insurance plan, or other person or entity which provides, offers to provide, or administers hospital, outpatient, medical, or other health care benefits to persons treated by a health care provider in this state pursuant to any policy, plan, or contract of accident and sickness insurance as defined in Code Section 33-7-2.

(4) "Standard" means a standard relating to administrative procedures and shall not include standards relating to medical treatment, quality of care, or best practices.

(b) The development, recognition, or implementation of any guideline by any public or private payor or the establishment of any payment standard or reimbursement criteria under any federal laws or regulations related to health care shall not be construed, without competent expert testimony establishing the appropriate standard of care, to establish a legal basis for negligence or the standard of care or duty of care owed by a health care provider to a patient in any civil action for medical malpractice or product liability. Nor shall compliance with such a guideline, standard, or criteria establish a health care provider's compliance with the standard of care or duty of care owed by a health care provider to a patient in any civil action for medical malpractice or medical product liability without competent expert testimony establish-

ing the appropriate standard of care. (Code 1981, § 51-1-52, enacted by Ga. L. 2013, p. 627, § 1/HB 499.)

Effective date. — This Code section became effective July 1, 2013.

Cross references. — Expert opinion testimony in civil cases, § 24-7-702.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2009, Code Section 51-1-52, as enacted by Ga. L. 2008, p. 702, § 4, was redesignated as Code Section 51-3-30.

Pursuant to Code Section 28-9-5, in 2013, Code Section 51-1-52, as enacted by Ga. L. 2013, p. 870, § 1/HB 382, was redesignated as Code Section 51-1-53.

51-1-53. Recreational joint-use agreements.

(a) As used in this Code section, the term:

(1) "Facilities" means a school's buildings, fixtures, and equipment, including, but not limited to, classrooms, libraries, rooms and space for physical education, space for fine arts, restrooms, specialized laboratories, cafeterias, media centers, building equipment, building fixtures, furnishings, gardens, tracks, stadiums, and other facilities or portions of facilities used primarily for athletic competition.

(2) "Recreational joint-use agreement" means a written agreement between the governing authority of a school and a private entity authorizing such entity to access the facilities of a school under the governing authority's jurisdiction for the purposes of conducting or engaging in recreational, physical, or performing arts activity.

(3) "School" means any public pre-kindergarten, elementary school, or secondary school.

(b) A recreational joint-use agreement shall:

(1) Set forth the terms and conditions of the use of a facility;

(2) Include a hold harmless provision in favor of the governing authority;

(3) Be revocable at any time by the governing authority of the school;

(4) Require the private entity to maintain and provide proof of a minimum of $1 million in liability insurance coverage applicable to the use of the facilities and effective for the duration of such agreement; and

(5) Provide a citation that such agreement shall be governed by this Code section.

(c) The governing authority of a school that enters into a recreational joint-use agreement which complies with subsection (b) of this Code section shall not be deemed to have waived its sovereign immunity as

to damages to persons or property arising out of or resulting from such recreational joint-use agreement.

(d) Code Section 51-12-33 shall not apply to claims for civil damages arising from the use of a school's facilities pursuant to a recreational joint-use agreement.

(e) This Code section shall apply to causes of action arising on or after July 1, 2013. (Code 1981, § 51-1-53, enacted by Ga. L. 2013, p. 870, § 1/HB 382.)

Effective date. — This Code section became effective July 1, 2013.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2013, Code Section 51-1-52, as enacted by Ga. L. 2013, p. 870, § 1, was redesignated as Code Section 51-1-53.

CHAPTER 2

IMPUTABLE NEGLIGENCE

Sec.

51-2-5.1. Relationship between hospital and health care provider prerequisite to liability; notice regarding independent contractor status; factors for consideration in determining status.

51-2-1. Basis for imputation of negligence; fault of parents or custodians not imputable to child.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Liability for identity theft. — Trial court properly granted summary judgment to auto dealer, mortgage broker, and lender. Even if it was assumed that the auto dealer and the mortgage broker were negligent in reviewing the credit application of another individual who was using the accused person's identity to obtain financing for a truck purchase, there was no evidence showing that either the auto dealer or the mortgage broker was acting as the lender's agent, and such a showing was necessary to sustain a recovery under a ratification theory. Blakey v. Victory Equip. Sales, 259 Ga. App. 34, 576 S.E.2d 38 (2002).

Individual not liable for negligent acts of a corporation's employee. — Summary judgment for a neighbor in a negligence suit by landowners arising out of fire damage was proper because a corporation, not the neighbor, owned the land on which the fire was set, and the person performing the burn was employed by the corporation, not the neighbor. There was no showing of agency under O.C.G.A. § 10-6-1 or O.C.G.A. § 51-2-1(a) between the neighbor and the employee. Barrs v. Acree, 302 Ga. App. 521, 691 S.E.2d 575 (2010).

Cited in Old Republic Union Ins. Co. v. Floyd Beasley & Sons, 250 Ga. App. 673, 551 S.E.2d 388 (2001); Hicks v. Walker, 262 Ga. App. 216, 585 S.E.2d 83 (2003); Dockens v. Runkle Consulting, Inc., 285 Ga. App. 896, 648 S.E.2d 80 (2007).

51-2-2. Liability for torts of spouse, child, or servant in certain instances.

Law reviews. — For article, "Sexual Harassment Claims Under Georgia Law," see 6 Ga. St. B.J. 16 (2000).

JUDICIAL DECISIONS

Analysis

General Consideration

Cited in Stephens v. Greensboro Properties, Ltd., 247 Ga. App. 670, 544 S.E.2d 464 (2001); Honig v. Comcast of Ga. I, LLC, 537 F. Supp. 2d 1277 (N.D. Ga. 2008); DaimlerChrysler Motors Co. v. Clemente, 294 Ga. App. 38, 668 S.E.2d 737 (2008); Safi-Rafiq v. Balasubramaniam, 298 Ga. App. 274, 679 S.E.2d 822 (2009).

Vicarious Liability

Preemption. — The immunity provision of the charter of the Macon Water Authority Act that exempted the Authority from vicarious liability was not preempted by § 51-2-2, and therefore, did not offend Art. III, Sec. VI, Par. IV (a) of the Georgia Constitution. Matthews v. Macon Water Auth., 273 Ga. 436, 542 S.E.2d 106 (2001).

Family Purpose Doctrine

1. General Principles

Supervision and control.

In insureds' suit seeking to recover damages in connection with an accident in which a daughter struck the insureds' vehicle while driving a car that was titled in her father's name, there existed genuine issues of material fact with regard to the father's liability in connection with the accident under Georgia's Family Purpose Doctrine, O.C.G.A. § 51-2-2, where the evidence showed that the father exercised authority and control over the car where the father took out the loan to buy the car, the title was in the father's name, the father contributed to the car's operating expenses, and the daughter was not listed as an insured on the policy that covered the car. Harris v. Houston, No. 4:04-cv-159 (HL), 2006 U.S. Dist. LEXIS 69099 (M.D. Ga. Sept. 26, 2006).

3. Use by Child

Authority and control created agency. — Where the parents had the right to exercise authority and control over the son's use of a family van, an agency relationship existed rendering the parents vicariously liable for the son's negligence; thus, partial summary judgment was properly granted. Gaither v. Sanders, 259 Ga. App. 810, 578 S.E.2d 512 (2003).

Requirements for family purpose met.

Trial court erred in granting summary judgment for a mother on an injured party's claim under the family purpose doctrine as: (1) the mother was the owner of the car and provided it to the son for his pleasure; (2) the son was in the car at the time of the collision; (3) the fact that the son was on his way to a friend's house at the time and was an adult did not preclude application of the family purpose doctrine; and (4) the evidence was in conflict as to the mother's right to exercise authority and control over the car as the son was under her general supervision and was expected to follow her rules while living at home and the son testified that his mother would have restricted his use of the car if she had known he was drinking or using drugs prior to the collision. Danforth v. Bulman, 276 Ga. App. 531, 623 S.E.2d 732 (2005).

A mother was not vicariously liable under the family purpose doctrine for an incident involving her minor son's car; although insurance was in the names of the mother and the son's stepfather and title was in the stepfather's name, the son purchased the car with his own funds and paid for its upkeep, maintenance, and insurance, and even if the stepfather were liable because he facilitated the purchase by holding title, the stepfather's liability would not be imputed to the mother. Dashtpeyma v. Wade, 285 Ga. App. 361, 646 S.E.2d 335 (2007).

Torts of Servant

3. Scope of Employment

Determining scope of employment.

Employee sufficiently rebutted a certification by the U.S. Attorney General under 28 U.S.C. § 2679(d)(1) that an assistant director (AD) acted within the scope of employment when the AD made an allegedly defamatory statement against the employee. Thus, the AD remained a party defendant in the employee's action under O.C.G.A. § 51-2-2. Schiefer v. United States, No. 07-14370, 2008 U.S. App. LEXIS 11678 (11th Cir. May 29, 2008) (Unpublished).

If tort of employee is wholly personal to himself, etc.

Appellate court erred in reversing the trial court's grant of summary judgment for the hospital after the patient sued the hospital on a respondeat superior theory for the acts of the hospital's employee in rubbing the patient's genitals after surgery when the employee was only authorized to check the groin area for surgical complications, as the hospital could not be liable as a matter of law because the patient could not show one requirement for finding the hospital liable, namely that the employee's purely personal act did anything to further the hospital's business. Piedmont Hosp., Inc. v. Palladino, 276 Ga. 612, 580 S.E.2d 215 (2003).

Manager was acting within the scope of his employment when wrong person arrested. — Since the undisputed evidence showed that the manager swore out the affidavit for arrest against defendant for the sole reason that he thought he was instructed to do so by his employer, the manager was acting within the scope and course of his employment even though he had the wrong person arrested. Rent to Own, Inc. v. Bragg, 248 Ga. App. 130, 546 S.E.2d 9 (2001).

Parking a tractor-trailer as furtherance of employer's business. — Trial court erred in granting an employer's motion for summary judgment in a widow's action to recover for the damages a driver sustained when the driver's car crashed into a tractor-trailer an employee had parked on the side of the road because the question of whether the employee's deviation from the employer's business was so slight and so closely connected with the employer's affairs that the employer could be held vicariously liable for the employee's alleged negligence had to be resolved by a jury; there was evidence that the

employee's act of driving the tractor-trailer from a landfill to a contractor's job site furthered the employer's business pursuant to O.C.G.A. § 51-2-2. Coe v. Carroll & Carroll, Inc., 308 Ga. App. 777, 709 S.E.2d 324 (2011).

Sexual advances by counselor as part of counseling "technique". — Because the defendant hospital had not granted a drug abuse counselor any authority to make the sexual advances and the counselor abused the counselor's authority to pursue the counselor's own sexual agenda in sexually harassing plaintiff patients, the counselor's conduct was outside the scope of the counselor's employment under O.C.G.A. § 51-2-2; the counselor's attempt to explain that the counselor's misconduct was part of the counselor's counseling "technique" was irrelevant. Doe v. Fulton-DeKalb Hosp. Auth., 628 F.3d 1325 (11th Cir. 2010).

4. Servant's Intentional Torts

Master not responsible for servant's sexual misconduct. — In an action in which an employee filed suit against an employer and a supervisor, alleging a claim of sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the court found that the employee could not succeed on the employee's claims against the corporate defendants based on respondeat superior; assuming, arguendo, the supervisor committed any one of the state law torts the employee alleged, the supervisor did not commit those torts in the prosecution and within the scope of the corporate defendants' business because they involved sexual misconduct. Mangrum v. Republic Indus., 260 F. Supp. 2d 1229 (N.D. Ga. 2003).

5. Principal—Agent Liability

Acts for agent's personal benefit.

The trial court did not err in granting summary judgment to an insurance agency on plaintiff's fraud claim because the acts of the agency's manager in accepting plaintiff's premiums without obtaining insurance were personal acts for his own benefit, involved no participation by the agency, and were of no benefit to the agency. GFA Bus. Solutions, Inc. v. Greenway Ins. Agency Inc., 243 Ga. App. 35, 531 S.E.2d 134 (2000).

6. Independent Contractors

Employer not liable for torts of independent contractor.

Absent evidence of a master-servant relationship or that the alleged master controlled the time, manner, means, or method by which the servant completed work, these independent parties were entitled to summary judgment as to the basis of liability in a wrongful death action filed against them. Gateway Atlanta Apts., Inc. v. Harris, 290 Ga. App. 772, 660 S.E.2d 750 (2008).

Entertainer was not liable for a security guard's alleged assault of a person attending a promotional event because there was no evidence that the guard was an employee, rather than an independent contractor, since there was no evidence that the entertainer controlled the manner and method of the guard's performance of the guard's security functions. Herring v. Harvey, 300 Ga. App. 560, 685 S.E.2d 460 (2009), cert. denied, No. S10C0389, 2010 Ga. LEXIS 305 (Ga. 2010).

7. Borrowed Servants

Determining status as borrowed servant.

Because an employer, as bailor, sent the employer's own employee with the thing bailed, a tractor with attached trash trailer, under O.C.G.A. § 44-12-62(b), a contractor, as the hirer, was liable only for the consequences of the employer's own directions or for the employer's gross negligence; the trial court erred in concluding that the contractor was entitled to summary judgment on the basis that the employee was not the contractor's borrowed servant because the evidence presented at least a factual issue regarding whether the employee was the contractor's borrowed servant since there was evidence that the contractor alone supervised the employee's work hauling debris, that the contractor controlled the employee's schedule for each day, and that the contractor dictated which landfill would receive the debris and when a load was ready. Coe v. Carroll & Carroll, Inc., 308 Ga. App. 777, 709 S.E.2d 324 (2011).

9. Pleading and Practice

True test for imputing liability is agency. — In a passenger's personal injury action against an owner of another vehicle that had been negligently driven by another, causing it to collide with the car in which the passenger was riding, summary judgment was properly granted to the owner under O.C.G.A. § 9-11-56 since the passenger did not offer evidence to support the passenger's claim for imputing liability on the owner, pursuant to O.C.G.A. § 51-2-2, beyond the passenger showing that the individual owned and insured the vehicle. The true test of liability for imputing liability was not the title or ownership but rather the agency. Collins v. Hamilton, 259 Ga. App. 52, 576 S.E.2d 42 (2002).

Torts of Servant — Specific Cases

1. Automobiles

Master not liable where servant uses vehicle for personal reasons not within scope of employment.

There was no evidence that the attempt of an employee of a law firm to deliver a check was in furtherance of the employer's business based on the fact that the employee was asked by a fellow employee to deliver the check which was issued by an entity other than the employer for initiation of phone service for an entity other than the employer. Chorey, Taylor & Feil, P.C. v. Clark, 273 Ga. 143, 539 S.E.2d 139 (2000).

No employer liability. — Although the driver of a company vehicle was negligent per se, the driver was not acting within the scope of the driver's job and the driver's corporate employer was not liable for the accident. Torres v. Tandy Corp., 264 Ga. App. 686, 592 S.E.2d 111 (2003).

County was not liable for its employee's collision with another driver under O.C.G.A. § 51-2-2 or respondeat superior, because although the employee was on call for the county, the employee was driving the employee's personal vehicle on the employee's way to work for another employer, and there was no evidence that the employee was acting at the county's direction at the time of the collision. Williams v. Baker County, 300 Ga. App. 149, 684 S.E.2d 321 (2009).

Slight detour to get a meal. — If an employee, who is driving to or from a destination while acting within the scope of his or her employment and in furtherance of the employer's business, detours slightly from the direct or customary route to that destination to get a meal, and if there is evidence that it serves the employer's interests for the employee to make the slight detour for that purpose, a jury issue exists regarding whether the employee is acting within the scope of the employee's employment during the brief detour. Coe v. Carroll & Carroll, Inc., 308 Ga. App. 777, 709 S.E.2d 324 (2011).

4. Retail Sales

Retail sales employer liable for torts of servant committed within scope of employment.

Restaurant employee acted within scope of employment based on evidence that the employee was cooking while using offensive language against plaintiff customers, identified himself as a restaurant employee when he called the police and told the responding officer that he was in charge, and based on employee's testimony that he believed he was doing his job when he called the police stating that he had to handle the situation because no manager was present. Middlebrooks v. Hillcrest Foods, Inc., 256 F.3d 1241 (11th Cir. 2001).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Parent's Failure to Supervise Children, 11 POF2d 541.

Parental Failure to Control Child, 45 POF2d 549.

Complicity Rule in Motor Vehicle Accident Cases: Employer's Authorization or Ratification of Driver's Conduct, 19 POF3d 437.

51-2-3. Liability for malicious acts of minor child.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

No liability where child's acts were not reckless.

A teenaged driver's negligence could not be imputed to his parents where he drove his girlfriend's car and injured her. The parents had not allowed their son to drive his girlfriend's car nor even known about it until after accident, and there was no proof that their son's actions were willful or malicious. Cole v. Fauk, 253 Ga. App. 892, 560 S.E.2d 772 (2002).

51-2-4. Liability for torts of independent employee.

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability to Specific Cases

General Consideration

Applicability.

In a premises liability action filed by plaintiff repairman arising from injuries suffered while repairing a roof, because the trial court properly found that an out-of-possession landlord and its tenants who surrendered control of the owned premises did not ratify the repairman's employer's actions in not providing safety equipment, and did not have superior knowledge of the dangers involved, the out-of-possession landlord and its tenants were properly granted summary judgment in the repairman's premises liability action; further, an exception under O.C.G.A. § 51-2-4 did not apply, as the vicarious liability of a landowner who undertook to provide security for the actions of its security agent was not equivalent to the liability of a landowner who hired a contractor to repair its roof. Saunders v. Indus. Metals & Surplus, Inc., 285 Ga. App. 415, 646 S.E.2d 294 (2007), cert. denied, 2007 Ga. LEXIS 624 (Ga. 2007).

Independent contractor is person employed to perform work, etc.

Absent evidence of a master-servant relationship or that the alleged master controlled the time, manner, means, or method by which the servant completed work, these independent parties were entitled to summary judgment as to the basis of liability in a wrongful death action filed against them. Gateway Atlanta Apts., Inc. v. Harris, 290 Ga. App. 772, 660 S.E.2d 750 (2008).

Seller of home assumed responsibility of contractor. — The trial court erred in granting summary judgment to a home seller in an action filed by the buyers against the seller alleging negligence and a breach of contract; notwithstanding the general rule outlined in O.C.G.A. § 51-2-4, the seller could not escape liability for the alleged negligence by two of the seller's contractors in grading the property and installing the home because the seller assumed that responsibility under the sales contract. French v. Sinclair-Oconee Homes of Milledgeville, LLC, 289 Ga. App. 696, 658 S.E.2d 226 (2008).

Test to determine status as independent contractor.

Respondeat superior principles were used to analyze a coverage question under a Georgia Interlocal Risk Management Agency agreement as the statutory language and coverage language was similar to that used by Georgia courts in applying the theory of respondeat superior. Ga.

Interlocal Risk Mgmt. Agency v. Godfrey, 273 Ga. App. 77, 614 S.E.2d 201 (2005).

Instructions such as giving a deadline for performance or requiring that work be completed at night or before the open of business each day do not amount to control over the time of the work because they do not purport to control specifically when any particular duties were to be performed. Adcox v. Atlanta Bldg. Maint. Co., 301 Ga. App. 74, 687 S.E.2d 137 (2009).

Employer under no general duty to contractor's employees.

In a wrongful death action premised on both negligence and negligence per se filed on behalf of a mother's deceased minor son, a premises owner was properly granted summary judgment, as the independent contractor that hired the decedent, and not the premises owner, had sole control over its personnel, and the son's hazardous occupation on the owner's premises for a third party did not in and of itself demonstrate that the owner was in violation of Georgia's child labor laws; thus, the appeals court declined to reach the issue of whether an owner who knew or had reason to know that its independent contractor was employing a minor under the age of 16 to perform a dangerous occupation on the owner's premises was in violation of O.C.G.A. § 39-2-2. Benson-Jones v. Sysco Food Servs. of Atlanta, LLC, 287 Ga. App. 579, 651 S.E.2d 839 (2007).

Cited in Atkins v. MRP Park Lake, L. P., 301 Ga. App. 275, 687 S.E.2d 215 (2009).

Applicability to Specific Cases

Automobiles and motor vehicles.

In a wrongful death action, evidence that the car dealership who hired a driver to transport one of its vehicles retained the right to control the time, method, and manner of the driver's work, raised questions of fact as to whether the driver was an employee or an independent contractor, and the dealership's summary judgment motion disclaiming liability under O.C.G.A. § 51-2-4 was denied; evidence included the fact that the dealership owned the vehicle that the driver was transporting, that the dealership did not check the driver's license or require separate insurance, and that the dealership retained the right to dictate the time that the driver was to depart with the vehicle and arrive at the destination. Richardson v. Dickerson, No. CV204-166, 2005 U.S. Dist. LEXIS 34948 (S.D. Ga. Nov. 28, 2005).

Taxicab company could not be held liable for a driver's negligence under the theory that the driver was the company's employee as the evidence did not show that the company assumed control over the time, manner, or method of the driver's work. The driver was free to work when the driver wanted, was not required to accept fares from the company, could obtain the driver's own fares, and could work anywhere the taxi could legally be operated; moreover, the car the driver was using was not owned by the company, but by another taxi driver. Lopez v. El Palmar Taxi, Inc., 297 Ga. App. 121, 676 S.E.2d 460 (2009).

Auto accidents. — Trial court erred in granting employers summary judgment in a driver's action to recover damages for injuries the driver sustained in a vehicle collision with an employee because there was a genuine issue of material fact as to whether the degree of control exercised by the employers over the employee's work was such that the employers could be held liable for the employee's alleged negligence against the driver; a genuine issue of material fact remained as to whether, at the time of the collision with the driver, the employee was acting in furtherance of the employers' business and within the scope of the business. Broadnax v. Daniel Custom Constr., LLC, 315 Ga. App. 291, 726 S.E.2d 770 (2012).

Automobile repossession.

Trial court erred in granting summary judgment in favor of a creditor as to whether it could be held vicariously liable for an independent contractor's acts in attempting to repossess a debtor's car because the creditor had a non-delegable statutory duty under O.C.G.A. § 11-9-609 to not breach the peace in repossessing the car, and if the contractor's attempt to repossess the car was in violation of the statute, the creditor would be chargeable with that conduct since it was done in violation of a duty imposed upon it by

statute; the creditor's duty was personal and non-delegable, and a recovery based upon a breach of that duty would not constitute imposition of liability without fault. Lewis v. Nicholas Fin., Inc., 300 Ga. App. 888, 686 S.E.2d 468 (2009).

Carriers.

When an injured party sued a taxicab company, alleging that the party was injured by a taxicab owned by the company which was negligently operated by its driver, who was the company's employee, the evidence at trial showed that the driver leased the taxicab from the company for a certain daily amount and that the company had no control over the manner in which the driver performed the work, so the driver was an independent contractor, and the company could not be held liable for the negligence under the doctrine of respondeat superior. Metro Taxi, Inc. v. Brackett, 273 Ga. App. 122, 614 S.E.2d 232 (2005).

In a wrongful death and personal injury suit, the trial court properly granted summary judgment in favor of a trucking company as the evidence of the trucking company's limited involvement in directing how its goods were shipped was insufficient as a matter of law to impose vicarious liability on it for a tractor-trailer driver's negligence. Further, because the driver was not an employee of the trucking company, the trucking company could not have negligently hired the driver as a matter of law. McLaine v. McLeod, 291 Ga. App. 335, 661 S.E.2d 695 (2008).

Motor carrier was not vicariously liable under O.C.G.A. § 51-2-4 for a freight company's negligent hiring of a partially blind, unlicensed trucker as the contract between the carrier and company provided that the company was an independent contractor with full control and direction of its employees, and there was no evidence that the carrier knew the company hired the trucker or that the carrier exercised control over the company's day-to-day operations. Clarendon Nat'l Ins. Co. v. Johnson, 293 Ga. App. 103, 666 S.E.2d 567 (2008), cert. denied, No. S08C2066, 2008 Ga. LEXIS 1004 (Ga. 2008); cert. denied, 556 U.S. 1229, 129 S. Ct. 2166, 173 L.Ed.2d 1169 (2009).

Courier. — Trial court did not err in denying a messenger service company's motion for summary judgment in a security guard's action alleging that the company was liable for a courier's conduct because although the employment contract between the courier and company designated the courier as an independent contractor, there was a genuine issue of material fact as to whether the degree of control the company exercised over the courier's delivery services was such that the company could be held liable for the courier's allegedly tortious actions against the security guard; the courier's claim that the courier was only permitted to work for the company was substantiated by the same contract, which prohibited the courier from allowing the courier's vehicle to be used by anyone other than the company. Ga. Messenger Serv. v. Bradley, 311 Ga. App. 148, 715 S.E.2d 699 (2011), cert. denied, 2012 Ga. LEXIS 56 (Ga. 2012).

Construction contractors and subcontractors.

When an independent subcontractor sued a retailer for injuries occurring while the subcontractor was doing work on the retailer's premises, the retailer was entitled to a directed verdict in its favor as the retailer exercised no control over the subcontractor's work, and any control over that work was contractually ceded to the subcontractor and to the contractor who hired the subcontractor. Neiman-Marcus Group, Inc. v. Dufour, 268 Ga. App. 104, 601 S.E.2d 375 (2004).

Utility provider to installer. — In a personal injury action against a utility and its independent contractor, the trial court properly granted summary judgment against a cable installer, finding that: (1) the utility was not vicariously liable to the installer for the allegedly negligent acts of its contractor (2) the utility's right to inspect the work did not render it liable for its contractor's negligence, as said right was intended for the limited purpose of making sure the contractor competently carried out the terms of the contract; (3) the utility was not liable for its failure to flag a power line trench in which the installer fell and was injured, as surface markings showing the path of the trench would not have informed the installer of the danger, and the

installer was not injured as a result of excavating or blasting; and (4) the High-voltage Safety Act, O.C.G.A. § 46-3-30 et seq., did not apply to afford the installer a remedy. Perry v. Georgia Power Co., 278 Ga. App. 759, 629 S.E.2d 588 (2006).

Janitorial service. — Trial court did not err in granting a janitorial services contractor summary judgment in an employee's suit to recover damages for injuries sustained when the employee slipped and fell on ice in the employer's parking lot because, under O.C.G.A. § 51-2-5(5), the contractor's indication to a subcontractor that mop water could be discarded in back of the building was insufficient to constitute an assumption of control by the contractor so as to create the relation of master and servant or so that an injury resulted that was traceable to its interference but was no more than a general indication that the mop water could be discarded in back of the building, and the contractor's willingness to supply materials to the subcontractor did not intrude into the subcontractor's ability to control the daily operations of its business; the agreement between the contractor and subcontractor provided for an independent contractor relationship because the subcontractor had full authority and responsibility over its employees, including hiring and firing, and under the agreement, the contractor had delivered full and complete possession of the premises to the subcontractor, which gave the specific instructions about where to discard the water. Adcox v. Atlanta Bldg. Maint. Co., 301 Ga. App. 74, 687 S.E.2d 137 (2009).

Brushing land. — Summary judgment was properly entered for a realtor and a developer as to a landowner's claim that the realtor and the developer were liable under O.C.G.A. §§ 51-2-4 and 51-2-5 for failing to ascertain and communicate to an independent contractor hired by the developer to brush the realtor's lot the location of the boundary between the realtor's lot and the landowner's lot; the developer testified that the developer used a creek and a transformer as landmarks for the boundary line in instructing the contractor, and the landowner did not challenge the use of the landmarks. Sorrow v. Hadaway, 269 Ga. App. 446, 604 S.E.2d 197 (2004).

Logger who did work for more than one company, owned his own equipment, was paid by the ton for the timber he cut, and negotiated the price before he began cutting was an independent contractor. Jacobs v. Thomson Oak Flooring, 250 Ga. App. 56, 550 S.E.2d 465 (2001).

Crop duster was independent contractor. — Crop duster was an independent contractor to a cotton farm owner. The farmer hired the crop duster on a one-time basis to apply the chemicals, the farmer did not control precisely when and how the crop duster flew during the crop dusting, and the farmer asked the crop duster to perform the defoliation based on the recommendation from a cotton scout that the farmer's crop was ready. Yancey v. Watkins, 308 Ga. App. 695, 708 S.E.2d 539 (2011).

Physicians. — Trial court properly granted summary judgment to professional corporation on the patient's medical malpractice action against it as the patient alleged that the doctor who allegedly caused the medical malpractice did so while acting as an agent or employee of the professional corporation, but the evidence actually showed the doctor was working for the second professional corporation with an office in another county, and that the doctor could not have been acting as an agent or employee of the professional corporation because the professional corporation was not active, the doctor had closed its office, and the patient at all times was seen by the doctor at the second professional corporation which the doctor incorporated after the professional corporation ceased to do business. Dix v. Shadeed, 261 Ga. App. 145, 581 S.E.2d 747 (2003).

Nightclub performer. — When a nightclub patron was injured by the alleged negligence of a performer at a nightclub, neither the nightclub nor the nightclub's employee could be held liable because the performer was an independent contractor, and not an employee of the nightclub as: (1) the nightclub's oral agreement with the performer only set when the performer would perform and

how much the performer would be paid, but did not dictate the manner or method of the performer's routine; (2) the nightclub's ability to stop the show, policy forbidding weapons, and determination of the schedule for performers' performances did not create a fact issue as to whether the nightclub controlled the time, manner, and method of the performance; and (3) while not dispositive, it was highly relevant that the performer did not perform the performer's services on a regular basis or for a fixed period of time. Orton v. Masquerade, Inc., 311 Ga. App. 656, 716 S.E.2d 764 (2011).

Employee making deliveries on day off. — In a personal injury case where an employee was involved in a collision during the employee's day off, but where the employee regularly made deliveries on that day between the employee's employer and affiliated companies, summary judgment for the affiliates was proper because the employee was acting, at most, as an independent contractor with respect to the affiliates in making the deliveries. Thompson v. Club Group, Ltd., 251 Ga. App. 356, 553 S.E.2d 842 (2001).

Tree felling. — In civil action for damages caused by felling of a tree under doctrine of respondeat superior, trial court erroneously denied homeowner's motion for summary judgment as an independent contractor was hired to fell the tree and homeowner had no control over contractor's actions, and act of felling tree was not wrongful in itself; moreover, homeowner's single suggestion or comment that contractor could proceed with felling the tree as an entire unit did not necessarily have to be followed and did not create liability on homeowner's part, but was simply confirming freedom of contractor to fell the tree as that contractor deemed appropriate. Whatley v. Sharma, 291 Ga. App. 228, 661 S.E.2d 590 (2008).

Workers' compensation.

When home buyers sued an engineering firm for professional negligence for an allegedly negligent inspection of the home, the firm's alleged professional negligence could not be imputed to the sellers or the sellers' agent, as the sellers and agent were not negligent in making the firm's representations themselves or inducing the firm to make a negligent inspection of the home. Smiley v. S & J Inves., Inc., 260 Ga. App. 493, 580 S.E.2d 283 (2003).

Lack of evidence supporting the contention that the worker was an employee. — Where the terms of a lease clearly denominated the worker as an independent contractor, the law presumed that the worker was in fact an independent contractor unless the evidence suggested otherwise and it did not in the instant case. The lack of evidence supporting the contention that the worker was an employee was fatal to the vicarious liability claim brought under O.C.G.A. § 51-2-4 against the corporations. Clark v. Roberson Mgmt. Corp., No. 5:03CV274 (DF), 2005 U.S. Dist. LEXIS 46972 (M.D. Ga. Jan. 11, 2005).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — "Fraudulent or Dishonest Act" by Employee Covered by Fidelity Bond, 13 POF3d 559.

Complicity Rule in Motor Vehicle Accident Cases: Employer's Authorization or Ratification of Driver's Conduct, 19 POF3d 437.

51-2-5. Liability for negligence of contractor.

Law reviews. — For annual survey of administrative law, see 56 Mercer L. Rev. 31 (2004). For annual survey of real property law, see 57 Mercer L. Rev. 331 (2005). For annual survey of law on labor and employment law, see 62 Mercer L. Rev. 181 (2010).

JUDICIAL DECISIONS

Analysis

General Consideration

Employer is not liable, etc.

The trial court did not err in finding that a power company was not liable to an injured employee of a contractor hired by the power company under the theory that cutting timber by hand was inherently dangerous, as the employee did not establish that the contractor's negligence led to the employee's injury pursuant to O.C.G.A. § 51-2-5; while the employee's experts testified that the contractor's safety program was lacking, the record did not show that any inadequacy in the safety program caused the employee's injury. Rayburn v. Ga. Power Co., 284 Ga. App. 131, 643 S.E.2d 385 (2007), cert. denied, 2007 Ga. LEXIS 507 (Ga. 2007).

In a wrongful death action premised on both negligence and negligence per se filed on behalf of a mother's deceased minor son, a premises owner was properly granted summary judgment, as the independent contractor that hired the decedent, and not the premises owner, had sole control over its personnel, and the son's hazardous occupation on the owner's premises for a third party did not in and of itself demonstrate that the owner was in violation of Georgia's child labor laws; thus, the appeals court declined to reach the issue of whether an owner who knew or had reason to know that its independent contractor was employing a minor under the age of 16 to perform a dangerous occupation on the owner's premises was in violation of O.C.G.A. § 39-2-2. Benson-Jones v. Sysco Food Servs. of Atlanta, LLC, 287 Ga. App. 579, 651 S.E.2d 839 (2007).

The trial court erred in granting summary judgment to a home seller in an action filed by the buyers against the seller alleging negligence and a breach of contract; notwithstanding the general rule outlined in O.C.G.A. § 51-2-4, the seller could not escape liability for the alleged negligence by two of the seller's contractors in grading the property and installing the home because the seller assumed that responsibility under the sales contract. French v. Sinclair-Oconee Homes of Milledgeville, LLC, 289 Ga. App. 696, 658 S.E.2d 226 (2008).

Liability of independent contractor generally.

Although exculpatory clauses signed by a pilot and a safety pilot who flew an aircraft company's plane and engaged in simulated aerial combat were not against public policy under O.C.G.A. § 1-3-7, they were not enforceable if the company was found to have been grossly negligent or to have engaged in willful misconduct, which was an issue to be resolved by the jury; additionally, a jury issue remained as to whether one of the pilots was an independent contractor for purposes of the company's liability under O.C.G.A. § 51-2-5(5), and accordingly, a grant of summary judgment pursuant to O.C.G.A. § 9-11-56 to the company was error. McFann v. Sky Warriors, Inc., 268 Ga. App. 750, 603 S.E.2d 7 (2004).

Test to determine status as independent contractor.

Instructions such as giving a deadline for performance or requiring that work be completed at night or before the open of business each day do not amount to control over the time of the work because they do not purport to control specifically when any particular duties were to be performed. Adcox v. Atlanta Bldg. Maint. Co., 301 Ga. App. 74, 687 S.E.2d 137 (2009).

Cited in Grey v. Milliken & Co., 245 Ga. App. 804, 539 S.E.2d 186 (2000); Mitchell v. Jones, 247 Ga. App. 113, 541 S.E.2d 103 (2000); Enviromediation Servs., LLC v. Boatwright, 256 Ga. App. 200, 568 S.E.2d 117 (2002); McLaine v. McLeod, 291 Ga. App. 335, 661 S.E.2d 695 (2008).

Applicability to Specific Cases

Auto accidents. — Trial court erred in granting employers' summary judgment in a driver's action to recover damages for

injuries the driver sustained in a vehicle collision with an employee because there was a genuine issue of material fact as to whether the degree of control exercised by the employers over the employee's work was such that the employers could be held liable for the employee's alleged negligence against the driver; a genuine issue of material fact remained as to whether, at the time of the collision with the driver, the employee was acting in furtherance of the employers' business and within the scope of the business. Broadnax v. Daniel Custom Constr., LLC, 315 Ga. App. 291, 726 S.E.2d 770 (2012).

Automobile repossession.

Trial court erred in granting summary judgment in favor of a creditor as to whether it could be held vicariously liable for an independent contractor's acts in attempting to repossess a debtor's car because the creditor had a non-delegable statutory duty under O.C.G.A. § 11-9-609 to not breach the peace in repossessing the car, and if the contractor's attempt to repossess the car was in violation of the statute, the creditor would be chargeable with that conduct since it was done in violation of a duty imposed upon it by statute; the creditor's duty was personal and non-delegable, and a recovery based upon a breach of that duty would not constitute imposition of liability without fault. Lewis v. Nicholas Fin., Inc., 300 Ga. App. 888, 686 S.E.2d 468 (2009).

Bulldozing for property owner.

Trespasser who employed two workers to cut and remove trees from the trespasser's property was jointly liable for the two workers wrongfully removing timber from the property owners' land as the trespasser erroneously pointed out the property line to the two workers, permitted the two workers to cut trees on the property owners' land when the trespasser knew the two workers should not be doing so, and ratified the two workers' misconduct by accepting and retaining payment for the wrongfully cut timber. Jones v. Ceniza, 257 Ga. App. 806, 572 S.E.2d 362 (2002).

Utility provider to installer. — In a personal injury action against a utility and its independent contractor, the trial court properly granted summary judgment against a cable installer, finding that: (1) the utility was not vicariously liable to the installer for the allegedly negligent acts of its contractor; (2) the utility's right to inspect the work did not render it liable for its contractor's negligence, as said right was intended for the limited purpose of making sure the contractor competently carried out the terms of the contract; (3) the utility was not liable for its failure to flag a power line trench in which the installer fell and was injured, as surface markings showing the path of the trench would not have informed the installer of the danger, and the installer was not injured as a result of excavating or blasting; and (4) the High-voltage Safety Act, O.C.G.A. § 46-3-30 et seq., did not apply to afford the installer a remedy. Perry v. Georgia Power Co., 278 Ga. App. 759, 629 S.E.2d 588 (2006).

Brushing land. — Summary judgment was properly entered for a realtor and a developer as to a landowner's claim that the realtor and the developer were liable under O.C.G.A. §§ 51-2-4 and 51-2-5 for failing to ascertain and communicate to an independent contractor hired by the developer to brush the realtor's lot the location of the boundary between the realtor's lot and the landowner's lot; the developer testified that the developer used a creek and a transformer as landmarks for the boundary line in instructing the contractor, and the landowner did not challenge the use of the landmarks. Sorrow v. Hadaway, 269 Ga. App. 446, 604 S.E.2d 197 (2004).

Crop dusting. — Aerial application of chemicals to open land involved sufficient inherent danger that it fell within the scope of O.C.G.A. § 51-2-5(2) such that an employer could be liable for the negligence of an independent contractor the employer hired to perform crop dusting work when chemicals drifted onto a neighboring crop, damaging the crop. Yancey v. Watkins, 308 Ga. App. 695, 708 S.E.2d 539 (2011).

Mill owner not liable for contractor's negligence. — A general contractor's worker was injured in a crane accident at a mill. The mill owner was not liable for the contractor's negligence under O.C.G.A. § 51-2-5(4) based on a violation of statutes as the contractor, not the

owner, was the worker's "employer" for purposes of 29 C.F.R. §§ 1910.179(n)(3)(x) and 1926.550(a)(19), which obliged an "employer" to require a crane operator not to lift loads over employees. Furthermore, the mill owner was not liable under paragraph (2) based on the inherently dangerous nature of the work since there was no evidence the mill owner knew the activity was inherently dangerous based on the owner's prior knowledge and experience. Boyd v. Packaging Corp. of Am., 292 Ga. App. 281, 664 S.E.2d 277 (2008).

Construction contractors and subcontractors.

When an independent subcontractor sued a retailer for injuries occurring while the subcontractor was doing work on the retailer's premises, the retailer was entitled to a directed verdict in its favor as the retailer exercised no control over the subcontractor's work, and any control over that work was contractually ceded to the subcontractor and to the contractor who hired the subcontractor. Neiman-Marcus Group, Inc. v. Dufour, 268 Ga. App. 104, 601 S.E.2d 375 (2004).

Summary judgment was properly entered for a realtor and a developer as to a landowner's claim under O.C.G.A. § 51-2-5(1) that the developer hired an independent contractor to undertake activities that were wrongful in that the contractor had no right to enter the landowner's land; the realtor did not hire the contractor, and the developer hired the contractor to brush the realtor's property, which was not wrongful in itself. Sorrow v. Hadaway, 269 Ga. App. 446, 604 S.E.2d 197 (2004).

In a premises liability action filed by a repairman arising from injuries suffered while repairing a roof, because the trial court properly found that an out-of-possession landlord and its tenants who surrendered control of the owned premises did not ratify the repairman's employer's actions in not providing safety equipment, and did not have superior knowledge of the dangers involved, the out-of-possession landlord and its tenants were properly granted summary judgment in the repairman's premises liability action. Saunders v. Indus. Metals & Surplus, Inc., 285 Ga. App. 415, 646 S.E.2d 294 (2007), cert. denied, 2007 Ga. LEXIS 624 (Ga. 2007).

The Department of Transportation's Utility Accommodation Policy and Standards did not impose the nondelegable duties of an applicant for an utility encroachment permit upon contractors doing work for the applicant; thus, in a personal injury suit, a contractor and a subcontractor doing work for a utility were not liable under O.C.G.A. § 51-2-5(4) for the actions of an independent contractor that was trimming trees for the subcontractor. Watkins v. First South Util. Constr., Inc., 284 Ga. App. 547, 644 S.E.2d 449 (2007).

A subcontractor's agreement to comply with "OSHA, state and local" safety regulations did not expressly impose a duty upon the subcontractor to ensure that safety devices were in place, as was required for it to be held liable under O.C.G.A. § 51-2-5(3) for the negligence of an independent contractor doing work for the subcontractor. Watkins v. First South Util. Constr., Inc., 284 Ga. App. 547, 644 S.E.2d 449 (2007).

Trial court erred in granting an apartment owner and a manager summary judgment in a tenant's action to recover damages for the personal injuries the tenant sustained from carbon-monoxide poisoning because the owner and manager could be liable for the actions of a construction company's workers even if the company, which was orally hired to assist in the clean up of the owner's apartments, was an independent contractor; the evidence showed that a temporary tarp repair the workers performed was completed so negligently that a defect in the premises was created, and some evidence showed that the company and its workers were not independent contractors. In placing a temporary tarp on the roof of the tenant's apartment, the company was performing the duty of the owner and manager to repair the premises by stopping a leak until a more permanent repair could be effected, and no written or oral contract outlined the company's precise responsibilities, setting forth specifications as to the work to be performed, nor did any contract identify a stipulated sum. Atkins v. MRP Park Lake, L. P., 301 Ga. App. 275, 687 S.E.2d 215 (2009).

Because an employer, as bailor, sent the employer's own employee with the thing bailed, a tractor with attached trash trailer, under O.C.G.A. § 44-12-62(b), a contractor, as the hirer, was liable only for the consequences of its own directions or for its gross negligence; the trial court erred in concluding that the contractor was entitled to summary judgment on the basis that the employee was not its borrowed servant because the evidence presented at least a factual issue regarding whether the employee was the contractor's borrowed servant since there was evidence that the contractor alone supervised the employee's work hauling debris, that the contractor controlled the employee's schedule for each day, and that the contractor dictated which landfill would receive the debris and when a load was ready. Coe v. Carroll & Carroll, Inc., 308 Ga. App. 777, 709 S.E.2d 324 (2011).

Installation services by an independent contractor. — Even if privity of contract existed, an injured party's claims failed, because the party neglected to point out an express contractual provision that would cast liability on either the supplier or distributor of an x-ray machine which allegedly caused the injuries due to poor installation by an installer, who was an independent contractor of the distributor. Kidd v. Dentsply Int'l, Inc., 278 Ga. App. 346, 629 S.E.2d 58 (2006).

In a case in which an individual sought to impose vicarious liability on a company for the installation of the company's cable line by a subcontractor, the individual's nuisance allegations, as they appeared in the individual's proposed amendment focused on the improper installation of the cable line, rather than on whether the cable line, if installed correctly, would pose a nuisance, the nuisance allegations did not fit within the exception to O.C.G.A. § 51-2-5(1), and the individual could not amend the complaint to add that claim against a company; that part of the proposed amendment would be futile. Whitley v. Comcast of Georgia, No. 3:05-cv-82 (CAR), 2007 U.S. Dist. LEXIS 26071 (M.D. Ga. Apr. 9, 2007).

Welding. — No Georgia authority existed finding that welding was an inherently dangerous activity; therefore, there was no error in the trial court's grant of summary judgment to the home center company on the homeowners' negligence claim that welding was an inherently dangerous activity for which the company remained responsible under the exception of O.C.G.A. § 51-2-5(2). Luther v. Wayne Frier Home Ctr. of Tifton, Inc., 264 Ga. App. 827, 592 S.E.2d 470 (2003).

Slip and fall. — The defendant was not entitled to immunity in a slip and fall case, notwithstanding its assertion that the fall was caused by the actions of an independent contractor, as the duty imposed on owner/occupiers to exercise ordinary care in keeping the premises and approaches safe is statutory; therefore, the defendant was liable for the acts and omissions of its independent contractor. Kroger Co. v. Strickland, 248 Ga. App. 613, 548 S.E.2d 375 (2001).

Injury at store. — Because no evidence was presented that a hardware store had actual knowledge that a hazard existed, summary judgment for the hardware store was proper in a claim for damages arising from an incident where a box fell on a customer at the hardware store. Green v. Home Depot U.S.A., Inc., 277 Ga. App. 779, 627 S.E.2d 836 (2006).

State contractors. — The Department of Veterans Services does not have a non-delegable duty to care for its veterans and it properly contracted with an independent contractor to run the State War Veterans' Home; thus, in an action based on negligent acts of the contractor resulting in the death of a veteran at the Home, the trial court erred in concluding that the Department could not avail itself of the independent contractor defense. Department of Veterans Servs. v. Robinson, 244 Ga. App. 878, 536 S.E.2d 617 (2000).

Trial court, in a wrongful death suit, erred by denying the motions of the Georgia Department of Human Resources and the Georgia Department of Juvenile Justice to dismiss and for a directed verdict, following the death of a juvenile the agencies placed in a corporate child care institution, as the two agencies were immune from suit under the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., and there was no waiver of sovereign immunity by the state. Ga. Dep't of Human Res.

v. Johnson, 264 Ga. App. 730, 592 S.E.2d 124 (2003).

Plaintiff did not have grounds for holding the Georgia Department of Human Resources and the Department of Juvenile Justice liable for the electrocution death of the plaintiff's child, which was caused by an employee for an independent contractor for the state, in part, because O.C.G.A. § 51-2-5 did not provide grounds for waiver of the state agencies' sovereign immunity. Johnson v. Ga. Dep't of Human Res., 278 Ga. 714, 606 S.E.2d 270 (2004).

Factory.

Worker's claim under O.C.G.A. § 51-2-5(4) against a tire manufacturing plant, for which the worker did independent contractor work pursuant to an agreement between the plant and the worker's employer, failed because the plant had no statutory or contractual duty to maintain a forklift or to ensure that the employer properly maintained it, and, accordingly, the trial court should have granted the plant's motion for judgment notwithstanding the verdict, pursuant to O.C.G.A. § 9-11-50; the forklift jumped backwards and due to a malfunctioning emergency brake, the transformer that it was carrying dropped and crushed the worker's arm, and it was noted that the forklift was purchased by the employer but was delivered directly to the plant and remained on those premises. Cooper Tire & Rubber Co. v. Merritt, 271 Ga. App. 16, 608 S.E.2d 714 (2004).

Janitorial service. — Trial court did not err in granting a janitorial services contractor summary judgment in an employee's suit to recover damages for injuries sustained when the employee slipped and fell on ice in the employer's parking lot because, under O.C.G.A. § 51-2-5(5), the contractor's indication to a subcontractor that mop water could be discarded in back of the building was insufficient to constitute an assumption of control by the contractor so as to create the relation of master and servant or so that an injury resulted that was traceable to its interference but was no more than a general indication that the mop water could be discarded in back of the building, and the contractor's willingness to supply materials to the subcontractor did not intrude into the subcontractor's ability to control the daily operations of its business; the agreement between the contractor and subcontractor provided for an independent contractor relationship because the subcontractor had full authority and responsibility over its employees, including hiring and firing, and under the agreement, the contractor had delivered full and complete possession of the premises to the subcontractor, which gave the specific instructions about where to discard the water. Adcox v. Atlanta Bldg. Maint. Co., 301 Ga. App. 74, 687 S.E.2d 137 (2009).

Hauling logging equipment was not shown to be inherently dangerous. Jacobs v. Thomson Oak Flooring, 250 Ga. App. 56, 550 S.E.2d 465 (2001).

Department of Human Resources cannot be held liable for the negligence of an independent contractor. The Georgia General Assembly has spoken by removing from the pool of State employees covered by the Georgia Tort Claims Act independent contractors and corporations, and by failing to include in O.C.G.A. § 51-2-5 a waiver of sovereign immunity. Thus, plaintiff's claim of negligence, based on a failure to notify of the child's sickle cell anemia, against the department was barred by sovereign immunity. In re Carter, 288 Ga. App. 276, 653 S.E.2d 860 (2007).

Tree felling. — In civil action for damages caused by felling of a tree under doctrine of respondeat superior, trial court erroneously denied homeowner's motion for summary judgment as an independent contractor was hired to fell the tree and homeowner had no control over contractor's actions, and act of felling tree was not wrongful in itself; moreover, homeowner's single suggestion or comment that contractor could proceed with felling the tree as an entire unit did not necessarily have to be followed and did not create liability on homeowner's part, but was simply confirming freedom of contractor to fell the tree as that contractor deemed appropriate. Whatley v. Sharma, 291 Ga. App. 228, 661 S.E.2d 590 (2008).

Wrongful eviction and trespass. — Trial court correctly granted limited liability companies (LLC) summary judg-

ment on the mortgagors' wrongful eviction and trespass claims given the absence of an independent legal duty imposed upon the companies; because a mortgagee was the legal title holder of foreclosed property, the duty to comply with the statutory dispossessory procedures provided in O.C.G.A. § 44-7-50 et seq. was imposed upon the mortgagee and could not be delegated to a third party, and since there was no evidence that the mortgagee ever sought to accomplish the mortgagee's statutory duties through an agent by contracting with either company to file a dispossessory action against the mortgagors on the mortgagee's behalf. The independent contractors had no separate legal duty to file a dispossessory action and then comply with the statutory procedures. Ikomoni v. Exec. Asset Mgmt., LLC, 309 Ga. App. 81, 709 S.E.2d 282 (2011).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Complicity Rule in Motor Vehicle Accident Cases: Employer's Authorization or Ratification of Driver's Conduct, 19 POF3d 437.

Am. Jur. Trials. — Structural Damage to Residential Buildings, 51 Am. Jur. Trials 493.

ALR. — Modern status of rules regarding tort liability of building or construction contractor for injury or damage to third person occurring after completion and acceptance of work; "foreseeability" or "modern" rule, 75 ALR5th 413.

51-2-5.1. Relationship between hospital and health care provider prerequisite to liability; notice regarding independent contractor status; factors for consideration in determining status.

(a) As used in this Code section, the term:

(1) "Health care professional" means a professional licensed as an audiologist, chiropractor, clinical social worker, dentist, dietitian, medical doctor, marriage and family therapist, registered professional or licensed practical nurse, occupational therapist, optometrist, osteopathic physician, pharmacist, physical therapist, physician assistant, professional counselor, podiatrist, psychologist, radiological technician, respiratory therapist, or speech-language pathologist.

(2) "Hospital" means a facility that has a valid permit or provisional permit issued by the Department of Community Health under Chapter 7 of Title 31.

(b) Notwithstanding the provisions of Code Section 51-2-5, no hospital which complies with the notice provisions of either subsection (c) or subsection (d) of this Code section shall be liable in a tort action for the acts or omissions of a health care professional unless there exists an actual agency or employment relationship between the hospital and the health care professional.

(c) The hospital shall post a notice in the form and manner described herein. Such notice shall:

(1) Be posted conspicuously in the hospital lobby or a public area of the hospital;

(2) Contain print at least one inch high; and

(3) Provide language substantially similar to the following:

"Some or all of the health care professionals performing services in this hospital are independent contractors and are not hospital agents or employees. Independent contractors are responsible for their own actions and the hospital shall not be liable for the acts or omissions of any such independent contractors."

(d) The hospital shall have the patient or the patient's personal representative sign a written acknowledgment that contains language substantially similar to that set forth in paragraph (3) of subsection (c) of this Code section.

(e) The notice required in this Code section shall be sufficient if it meets the requirements of either subsection (c) or subsection (d) of this Code section even if the patient or the patient's personal representative did not see or read such notice for any reason, including but not limited to medical condition or language proficiency.

(f) Whether a health care professional is an actual agent, an employee, or an independent contractor shall be determined by the language of the contract between the health care professional and the hospital. In the absence of such a contract, or if the contract is unclear or ambiguous, a health care professional shall only be considered the hospital's employee or actual agent if it can be shown by a preponderance of the evidence that the hospital reserves the right to control the time, manner, or method in which the health care professional performs the services for which licensed, as distinguished from the right to merely require certain definite results.

(g) If the court finds that there is no contract or that the contract is unclear or ambiguous as to the relationship between the hospital and health care professional, the court shall apply the following:

(1) Factors that may be considered as evidence the hospital exercises a right of control over the time, manner, or method of the health care professional's services include: the parties believed they were creating an actual agency or employment relationship; the health care professional receives substantially all the employee benefits received by actual employees of the hospital; the hospital directs the details of the health care professional's work step-by-step; the health care professional's services are terminable at the will of the hospital without cause and without notice; the hospital withholds, or is required to withhold, federal and state taxes from the remuneration paid to the health care professional for services to the patients of the

hospital; and factors not specifically excluded in paragraph (2) of this subsection; and

(2) Factors that shall not be considered as evidence a hospital exercises a right of control over the time, manner, or method of the health care professional's services include: a requirement by the hospital that such health care professional treat all patients or that any health care professional or group is obligated to staff a hospital department continuously or from time to time; the hospital's payment to the health care professional on an hourly basis; the provision of facilities or equipment by the hospital; the fact a health care professional does not maintain a separate practice outside the hospital; the source of the payment for the professional liability insurance premium for that health care professional; the fact that the professional fees for services are billed by the hospital; or any requirement by the hospital that such health care professional engage in conduct required to satisfy any state or federal statute or regulation, any standard of care, any standard or guideline set by an association of hospitals or health care professionals, or any accreditation standard adopted by a national accreditation organization. (Code 1981, § 51-2-5.1, enacted by Ga. L. 2005, p. 1, § 11/SB 3; Ga. L. 2008, p. 12, § 2-38/SB 433; Ga. L. 2009, p. 859, § 3/HB 509.)

Effective date. — This Code section became effective February 16, 2005.

The 2008 amendment, effective July 1, 2009, substituted "Department of Community Health" for "Department of Human Resources" in paragraph (a)(2).

The 2009 amendment, effective July 1, 2009, substituted "physician assistant" for "physician's assistant" near the end of paragraph (a)(1).

Editor's notes. — Ga. L. 2005, p. 1, § 1, not codified by the General Assembly, provides that: "The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act."

Ga. L. 2005, p. 1, § 14, not codified by the General Assembly, provides for severability.

Ga. L. 2005, p. 1, § 15(b), not codified by the General Assembly, provides that this Code section shall apply only with respect to causes of action arising on or after February 16, 2005, and any prior causes of action shall continue to be governed by prior law.

Law reviews. — For article on 2005 enactment of this Code section, see 22 Ga. St. U.L. Rev. 221 (2005). For article, "State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010).

51-2-6. Liability of owner or keeper of dog for damage done to livestock while off his or her premises.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 1C Am. Jur. Pleading and Practice Forms, Animals, § 110.

51-2-7. Liability of owner or keeper of vicious or dangerous animal for injuries caused by animal.

Cross references. — Vicious dogs, T. 4, C. 8, A.3.

Law reviews. — For annual survey article on tort law, see 52 Mercer L. Rev. 421 (2000). For survey article on law of torts, see 59 Mercer L. Rev. 397 (2007). For annual survey on law of torts, see 61 Mercer L. Rev. 335 (2009).

For note, "Is There (and Should There Be) Any 'Bite' Left in Georgia's 'First Bite' Rule?" see 34 Ga. L. Rev. 1343 (2000).

JUDICIAL DECISIONS

Analysis

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General Consideration

Cited in Bakhtiarnejad v. Cox Enters., Inc., 247 Ga. App. 205, 541 S.E.2d 33 (2000).

Knowledge

Lack of knowledge of vicious and dangerous character.

In a wrongful death action based on the death of an infant caused by a dog, the dog owner was entitled to summary judgment on the parent's claim under O.C.G.A. § 51-2-7 because there was no evidence that the animal had ever attacked or bitten a human; the owner's rule that the dog stay outside unless accompanied by a person was a result of the dog's destruction of property, not due to any threat the dog posed to animals or humans. Harper v. Robinson, 263 Ga. App. 727, 589 S.E.2d 295 (2003).

In a personal injury suit brought by a visitor seeking damages for injuries incurred after being kicked by a horse, the owner of the real property was properly granted summary judgment since there was no evidence whatsoever that the owner was aware of any vicious propensity on the part of the horse; the owner filed an affidavit, stating that the owner boarded the horses for many years and never observed the horse who injured the visitor exhibit the propensity to run directly at any person or exhibit any violent, vicious, or dangerous behavior. Burns v. Leap, 285 Ga. App. 307, 645 S.E.2d 751 (2007).

Dog-bite victim sued the dog's owners, alleging the owners failed to warn the victim of the dog's vicious tendencies. As there was no evidence the dog had ever previously bitten or attacked anyone, and an owner's alleged statement that children would not "have to worry about getting bit" if the children stayed away from the owner's truck, where the dog was chained in the truck bed, was insufficient to establish the owners' knowledge of the dog's vicious propensity; thus, the owners were properly granted a directed verdict on this claim. Huff v. Dyer, 297 Ga. App. 761, 678 S.E.2d 206 (2009).

Owner is not responsible for acts of dog if there is lack of scienter.

In a typical dog bite case, regardless of whether the cause of action is based on the premises liability statute of O.C.G.A. § 51-3-1, or the dangerous animal liability statute of O.C.G.A. § 51-2-7, a plaintiff must produce evidence of the vicious propensity of the dog in order to show that the owner of the premises had superior knowledge of the danger. Custer v. Coward, 293 Ga. App. 316, 667 S.E.2d 135 (2008).

Knowledge of propensity, etc.

In accord with Rowlette v. Paul. See Clark v. Joiner, 242 Ga. App. 421, 530 S.E.2d 45 (2000).

Insufficient knowledge of dog's vicious propensities. — Where the worker who was knocked down, allegedly by the dog owners' dog, was unable to show that the dog had any dangerous propensities or that the dog owner knew about such propensities, the worker could not recover either under the dangerous animal liability statute, O.C.G.A. § 51-2-7, or the premises liability statute, O.C.G.A. § 51-3-1; however, the trial court erred in granting summary judgment to the dog owners as a genuine issue of material fact still existed regarding whether the one dog owner voluntarily undertook a duty to restrain the dogs on the owner's premises, and, if so, whether that voluntary undertaking was negligently performed. Osowski v. Smith, 262 Ga. App. 538, 586 S.E.2d 71 (2003).

Trial court did not err in granting a dog owner summary judgment in a nurse's action under the dangerous animal liability statute, O.C.G.A. § 51-2-7, to recover for injuries the nurse sustained when the dog bit the nurse while the nurse was at the owner's home because there was no genuine issue of material fact that the dog was required to be at heel or on a leash or that the owner had knowledge that the dog had the propensity to bite a human; section 10-11(a)(1) of the Cobb County, Ga., animal control ordinance did not require the dog to be at heel or on a leash at the time of the incident. Stennette v. Miller, 316 Ga. App. 425, 729 S.E.2d 559 (2012).

Guard dogs. — The scienter requirement applies in the case of a dog specifically purchased and used for guarding commercial property. Wade v. American Nat'l Ins. Co., 246 Ga. App. 458, 540 S.E.2d 671 (2000).

Victim's knowledge of dog's aggressive tendencies. — Trial court properly granted summary judgment to dog owners in dog bite case in light of the evidence of the victim's equal or superior knowledge of the dog's aggressive tendencies and assumption of the risk in petting the dog. Durham v. Mason, 256 Ga. App. 467, 568 S.E.2d 530 (2002).

Trial court did not err in granting a dog owner summary judgment in a roommate's action under the vicious animal statute, O.C.G.A. § 51-2-7, and the premises liability statute, O.C.G.A. § 51-3-1, to recover damages for injuries the roommate sustained when the owner's dog attacked the roommate inside the owner's townhouse because the roommate had knowledge of the dog's vicious propensity equal to that of the owner's; the roommate's own testimony was that the roommate was aware of the dog's previous unprovoked attack and was nervous when around the dog, presumably because the roommate was afraid that the dog could attack again. Stolte v. Hammack, 311 Ga. App. 710, 716 S.E.2d 796 (2011).

Violation of Ordinances

Dog not confined as required by ordinance.

When a dog's owner allowed the dog to run free inside his house, including having access to doors leading outside the house, a genuine fact issue was present as to whether the dog was allowed to roam free in violation of a local ordinance. Johnston v. Warendh, 252 Ga. App. 674, 556 S.E.2d 867 (2001).

No evidence that ordinance was violated. — Dog-bite victim sued the dog's owners, asserting a claim of negligence per se. As the dog had not been running at large, and the applicable ordinance did not protect people such as the victim who approached a dog that was restrained in the bed of a truck, the victim's motion for a directed verdict on this claim was properly denied. Huff v. Dyer, 297 Ga. App. 761, 678 S.E.2d 206 (2009).

Trial court erred in denying an animal

care clinic's motion for summary judgment in a guest's action to recover damages for injuries the guest sustained when a dog bit the guest because the guest could not establish vicious propensity pursuant to O.C.G.A. § 51-2-7 through a violation of the county animal ordinances; the dog was not running at large in violation of Cherokee County, Ga., Ordinance Sec. 10-29(a) at the time of the guest's injury. Abundant Animal Care, LLC v. Gray, 316 Ga. App. 193, 728 S.E.2d 822 (2012).

Procedure

Summary judgment in favor of homeowner proper because dog belonged to homeowner's visiting child. — Homeowner was not the owner or keeper of a dog who attacked a home health care provider in the homeowner's driveway; the provider admitted in the complaint and in a deposition that the dog was owned by the homeowner's child, who was visiting from another city. Therefore, the homeowner was not liable to the provider for the dog's attack under O.C.G.A. § 51-2-7. Cormier v. Willis, 313 Ga. App. 699, 722 S.E.2d 416 (2012).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Plaintiff's Negligence, Provocation, or Assumption of Risk as Defense in Dogbite Cases, 39 POF3d 133.

Am. Jur. Pleading and Practice Forms. — 1C Am. Jur. Pleading and Practice Forms, Animals, § 92.

CHAPTER 3

LIABILITY OF OWNERS AND OCCUPIERS OF LAND

Article 3

Owners of Property Used for Other Purposes

ARTICLE 1

GENERAL PROVISIONS

51-3-1. Duty of owner or occupier of land to invitee.

Law reviews. — For article, "Construction Law," see 53 Mercer L. Rev. 173 (2001). For article, "Premises Liability for Criminal Attacks: Same Crimes, New Law," see 5 Ga. St. B.J. 54 (1999). For survey article on construction law, see 60 Mercer L. Rev. 59 (2008). For annual survey on law of torts, see 61 Mercer L. Rev. 335 (2009). For annual survey on torts, see 64 Mercer L. Rev. 287 (2012).

For note, "Between Bystander and Insurer: Locating the Duty of the Georgia Landowner to Safeguard Against Third-Party Criminal Attacks on the Premises," see 15 Ga. St. U.L. Rev. 1099 (1999).

JUDICIAL DECISIONS

Analysis

General Consideration

1. In General

Knowledge and appreciation of risk bars recovery. — Tort liability under either O.C.G.A. §§ 51-1-2 or 51-3-1 is barred when the plaintiff, with actual knowledge and subjective appreciation of the risk, undertakes an obvious danger from the employee's negligence. Sones v. Real Estate Dev. Group, Inc., 270 Ga. App. 507, 606 S.E.2d 687 (2004).

Distraction doctrine did not allow a homeowner to be held liable for an invitee's "trip and fall" injury suffered at the homeowner's home due to hazardous steps because: (1) the invitee saw and appreciated any hazard posed by the steps; and (2) under such circumstances, a mere distraction could not overcome summary judgment when the invitee had actual, prior knowledge of the hazard, so, even if the homeowner knew of the alleged hazard, the invitee could not recover due to the invitee's equal knowledge of the hazard. Benefield v. Vance, 315 Ga. App. 505, 726 S.E.2d 531 (2012).

Plaintiff knew there was a pothole in the area where the plaintiff parked and that the plaintiff could have seen the plaintiff was placing the plaintiff's foot in the pothole if the plaintiff had looked. Because the plaintiff's knowledge of the hazard that caused the plaintiff's fall and resulting injuries was at least equal to that of the landowner, the plaintiff could not recover. LeCroy v. Bragg, 319 Ga. App. 884, 739 S.E.2d 1 (2013).

Prudence of the ordinarily careful person, etc.

In accord with Robinson v. Kroger Co. See Christensen v. Overseas Partners Capital, Inc., 249 Ga. App. 827, 549 S.E.2d 784 (2001).

The "equal knowledge rule", etc.

Victim's negligence claim for personal injuries suffered while traversing the owner's gas station parking lot was properly dismissed; as the victim had actual knowledge of the allegedly hazardous condition, it was equal to the owner's knowledge, and therefore the distraction doctrine did not apply. Delk v. Quiktrip Corp., 258 Ga. App. 140, 572 S.E.2d 676 (2002).

Knowledge of defective electrical wiring. — Because a painter failed to show that a homeowner's knowledge of an electrical wiring defect was superior to that of the painter, the homeowner was entitled to summary judgment as to the issue of the homeowner's liability. Schuessler v. Bennett, 287 Ga. App. 880, 652 S.E.2d 884 (2007), cert. denied, 2008 Ga. LEXIS 230 (Ga. 2008).

Evidence sufficient to preclude summary judgment.

When a delivery person slipped and fell on loose telephone books at a hospital loading dock, the hospital was properly denied summary judgment; there was an issue of fact as to whether the hospital had constructive knowledge of the condi-

tion, the hospital did not show that the delivery person's knowledge of the hazard was equal or superior to its own, the voluntary departure rule did not apply because there was evidence that the route taken by the delivery person was an authorized one and was routinely used, and whether the delivery person was negligent in not watching where the delivery person stepped was for the jury to resolve. Kennestone Hosp., Inc. v. Harris, 285 Ga. App. 393, 646 S.E.2d 490 (2007).

No liability found. — Where the worker who was knocked down, allegedly by the dog owners' dog, was unable to show that the dog had any dangerous propensities or that the dog owner knew about such propensities, the worker could not recover either under the dangerous animal liability statute, O.C.G.A. § 51-2-7, or the premises liability statute, O.C.G.A. § 51-3-1; however, the trial court erred in granting summary judgment to the dog owners as a genuine issue of material fact still existed regarding whether the one dog owner voluntarily undertook a duty to restrain the dogs on the owner's premises, and, if so, whether that voluntary undertaking was negligently performed. Osowski v. Smith, 262 Ga. App. 538, 586 S.E.2d 71 (2003).

True ground of premises liability is the landowner's or occupier's superior knowledge of the perilous condition and the danger therefrom to persons coming upon the property, and it is when the perilous condition is known to the owner/occupier and not known to the person injured that a recovery is permitted; a trial court's summary judgment dismissing claims against real estate agents and brokers for injuries arising from a dog bite while the injured person was viewing listed property for sale was affirmed where there was no showing that the real estate agents and brokers had any knowledge that the dogs were dangerous. Gibson v. Rezvanpour, 268 Ga. App. 377, 601 S.E.2d 848 (2004).

Because: (1) the undisputed evidence presented to the trial court was that a retailer had no knowledge of a hazard posed by a previously loaded BB gun placed on an open display shelf and accessible to children; and (2) a parent failed to show that it was reasonably foreseeable that the parent's child would take the gun and shoot the child's sibling, the trial court did not err in granting the retailer summary judgment as to the issue of its liability. Roberts v. Wal-Mart Stores, Inc., 287 Ga. App. 316, 651 S.E.2d 464 (2007).

Cited in Lee v. Lion, 243 Ga. App. 819, 534 S.E.2d 507 (2000); Medley v. Home Depot, Inc., 252 Ga. App. 398, 555 S.E.2d 736 (2001); Doe v. HGI Realty, Inc., 254 Ga. App. 181, 561 S.E.2d 450 (2002); Gilbert v. Auto. Purchasing Serv., 254 Ga. App. 770, 563 S.E.2d 906 (2002); Odister v. Leach, 257 Ga. App. 106, 570 S.E.2d 391 (2002); Barnes v. St. Stephen's Missionary Baptist Church, 260 Ga. App. 765, 580 S.E.2d 587 (2003); Thomas v. Exec. Comm. of the Baptist Convention, 262 Ga. App. 315, 585 S.E.2d 217 (2003); Am. Multi-Cinema, Inc. v. Walker, 270 Ga. App. 314, 605 S.E.2d 850 (2004); Norman v. Jones Lang LaSalle Ams., Inc., 277 Ga. App. 621, 627 S.E.2d 382 (2006).

2. Determining Invitee Status

Licensee found. — Injured party was a licensee where the injured party entered into the lobby of a radio station just to be with the injured party's child, who was being interviewed, and had no other business at the station; the station did not obtain a benefit by virtue of the injured party's visit and did not impliedly invite the public at large into its lobby. Howard v. Gram Corp., 268 Ga. App. 466, 602 S.E.2d 241 (2004).

Summary judgment should have been granted in favor of a store and its employees on a tortious misconduct claim in a parent's action arising out of the employees' claim that the parent's child stole from the store because the child did not meet the legal definition of an invitee under O.C.G.A. § 51-3-1; the child had to be regarded as a licensee under O.C.G.A. § 51-3-2(a)(3) because the child entered the store only to use its bathroom and had no intention of shopping there. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Neighbor as invitee.

Court properly granted summary judgment to defendants after a neighbor

slipped and fell on their lawn while bringing in their newspaper, since the defendants had no knowledge that the sprinkler system had caused the ground to become soggy. Hansen v. Cooper, 253 Ga. App. 533, 559 S.E.2d 740 (2002).

Prison visitors. — Trial court erred in determining that a prison visitor was a licensee because the visitor's status was that of an invitee since both the visitor and the state and Department of Corrections received benefits from prison visitation; the prison at issue held itself open to visitors, maintaining regular visitation hours, and the state and Department supported inmate visitation. Freeman v. Eichholz, 308 Ga. App. 18, 705 S.E.2d 919 (2011).

Invitation is implied where entry on premises is for purpose which is, or is supposed to be, beneficial to owner.

Federal food inspector was an invitee under O.C.G.A. § 51-3-1, not a licensee under O.C.G.A. § 51-3-2, because the inspector was not present at an owner's chicken processing plant merely for the inspector's own pleasure or convenience but rather pursuant to United States Department of Agriculture (USDA) responsibilities; the owner could not have legally conducted business without the presence of USDA inspectors, which indicated that the owner received an advantage from the inspector's presence on the property and, thus, was easy to infer that the owner invited the inspector onto the premises in order to ensure compliance with federal regulations so that the owner could operate the plant. Sanderson Farms, Inc. v. Atkins, 310 Ga. App. 423, 713 S.E.2d 483 (2011).

3. Duty Owed to Invitee by Owner/Occupier or Proprietor

Hotel proprietors.

Plaintiff's claim for negligent failure to maintain the premises in a reasonably safe manner under O.C.G.A. § 51-3-1 failed because the plaintiff did not present competent evidence that the criminal act committed against the plaintiff on defendant hotel's property by the unidentified third parties was reasonably foreseeable, the hotel did not have superior knowledge of the harm, and plaintiff assumed the risk of harm. Gordon v. Starwood Hotels & Resorts Worldwide, Inc., No. 1:09-CV-3493-CC, 2011 U.S. Dist. LEXIS 109644 (N.D. Ga. Sept. 26, 2011).

Gas station sign. — Summary judgment for a gas station on a customer's claim for injuries arising from an incident where the customer tripped over sign legs and fell was proper; the sign posed no inherent danger, testimony indicated that the sign had always been there since the gas station opened, and there was no basis for liability under O.C.G.A. § 51-3-1. Rowland v. Murphy Oil USA, Inc., 280 Ga. App. 530, 634 S.E.2d 477 (2006).

Duty of owner or occupier, etc.

An owner or occupier of land is liable in damages to invitees who come upon the land for injuries occasioned by the failure to exercise ordinary care in keeping the premises safe. Lake v. Atlanta Landmarks, Inc., 257 Ga. App. 195, 570 S.E.2d 638 (2002).

Trial court erred in granting summary judgment to a food service corporation in a bench user's personal injury action, which arose when the user sat on a bench at a university and the bench collapsed, causing the user to fall and suffer injuries, as it was unclear from the contractual language between the corporation and the university whether the corporation had assumed control over the bench where the incident occurred; pursuant to O.C.G.A. § 51-3-1, the owner or occupier of the land had a duty to exercise ordinary care for invitees, but it was unclear whether the corporation was an occupier of the premises, which were owned by the university. Nair v. Aramark Food Serv. Corp., 276 Ga. App. 793, 625 S.E.2d 78 (2005).

A business entity and its owners did not breach their duty of care under O.C.G.A. § 51-3-1 to an invitee because the alleged defect in a transition area between dark, rubberized mat flooring around a playground and a green, astroturf-type surface was static and the invitee had successfully negotiated the transition area once to get into the playground; no other customers fell in the transition area in the three years that the business had been open. Sherrod v. Triple Play Cafe, LLC, 285 Ga. App. 689, 647 S.E.2d 376 (2007).

Summary judgment was properly granted to owners and managers of a shopping center in a store employee's trip and fall action, which occurred as the employee stepped on a grassy median between a sidewalk and the center's parking lot, as the owners and managers exercised ordinary care by conducting inspections of the premises which were reasonable under the circumstances pursuant to O.C.G.A. § 51-3-1. Berni v. Cousins Props. Inc., 316 Ga. App. 502, 729 S.E.2d 617 (2012).

Daughter was social guest, not invitee. — In a slip and fall action between a daughter and the daughter's mother, because the evidence showed that the daughter was a mere social guest or licensee in the mother's home at the time of the daughter's injury, and not an invitee, present only in the home for the daughter's convenience, and the mother did not act with any intent to harm the daughter, the mother was properly granted summary judgment on the issue of liability for the daughter's personal injuries resulting from a slip and fall. Behforouz v. Vakil, 281 Ga. App. 603, 636 S.E.2d 674 (2006).

True ground of liability, etc.

In a patron's slip and fall action filed against a home seller, the trial court properly found that the seller was entitled to summary judgment as a matter of law because the patron could not show that the seller's knowledge of the condition which allegedly caused the patron's fall, specifically, loose gravel on the ground immediately adjacent to unbuffered metal trailer tongues, was superior to the patrons. Whitley v. H & S Homes, LLC, 279 Ga. App. 877, 632 S.E.2d 728 (2006).

Premises owner was properly granted summary judgment in an occupant's personal injury action filed against it as the uneven and unstable brick-paved walkway where the occupant fell was an open and obvious static condition which the occupant was presumed to have knowledge of, given that the occupant had successfully traversed the area before; moreover, while the occupant might have disagreed with the trial court's application of the law to the facts presented, that disagreement did not warrant reversal. Nemeth v. RREEF Am., LLC, 283 Ga. App. 795, 643 S.E.2d 283 (2007).

Knowledge of owner compared to inspector. — Trial court did not err in denying the owner of a chicken processing plant summary judgment in a federal food inspector's action to recover damages for injuries the inspector sustained when the inspector slipped and fell on a piece of viscera at the plant because the owner failed to carry the owner's burden on summary judgment to establish that the owner did not have constructive knowledge of the substance on the floor; the owner established that the owner had a customary inspection and cleaning procedure, but the owner failed to introduce any evidence to show adherence to the owner's inspection and cleaning procedure on the day of the inspector's fall. Sanderson Farms, Inc. v. Atkins, 310 Ga. App. 423, 713 S.E.2d 483 (2011).

Whether owner/occupier knew or should have known of alleged defect is question of fact.

Condominium association did not owe a duty of care to a condominium owner's husband, who was killed by the criminal acts of third parties in the condominium's common area parking lot, because the condominium owners had specifically contracted that the association did not have a duty to provide security. Bradford Square Condo. Ass'n v. Miller, 258 Ga. App. 240, 573 S.E.2d 405 (2002).

Proprietor under no duty to warn where invitee knows danger and assumes risk.

Babysitter, who was an invitee in premises liability action based upon the babysitter's slipping and falling on a coin on the floor, could not recover because the babysitter's knowledge of the dangerous condition of the coins being on the floor of the property was at least that of the property owner. Ballard v. Burnham, 256 Ga. App. 531, 568 S.E.2d 743 (2002).

Because a customer seeking damages from a fall caused by tripping over a gas hose at a gas station admitted to having actual knowledge of the hazard at issue, the hose, the gas station did not have superior knowledge of the hazard, and the customer was unable to establish this element of the claim; thus, summary judg-

ment in favor of the gas station was required. Right Stuff Food Stores, Inc. v. Gilchrist, 279 Ga. App. 784, 632 S.E.2d 405 (2006).

Victim's estate, as a matter of law, did not show that the owner violated the owner's duty of care under O.C.G.A. § 51-3-1 at the time the victim, who lived with the owner and the owner's son, who was the boyfriend, was shot by the boyfriend; the owner did not know more about the owner's son's violent designs on the victim than the victim knew, as the victim was with the boyfriend at the time the boyfriend was apprehended as armed and dangerous, friends of the couple noted the boyfriend's abusive treatment of the victim, and there was no evidence that the boyfriend had previously committed an assault or another such crime on or near owner's property or against any member of the household. Hembree v. Spivey, 281 Ga. App. 693, 637 S.E.2d 94 (2006).

Because a party injured in a fall admitted to having actual knowledge not only of the alleged hazard which caused the fall, but of the specific danger the hazard presented, and as a result, appreciated the danger involved, the trial court erred in denying summary judgment to the premises owner as to the issue of liability, given that based on the foregoing, the party should have avoided any injury in the exercise of ordinary care. Callaway Gardens Resort, Inc. v. Bierman, 290 Ga. App. 111, 658 S.E.2d 895 (2008).

No liability where invitee fails to show owner's actual or constructive knowledge. — In a premises liability action filed by a guest of a property owner, because the guest failed to show that the owner had any actual or constructive knowledge of the alleged hazard that allegedly caused the guest's injuries, specifically, a hole in an otherwise flat, grassy area of the owner's yard, the court properly granted the owner summary judgment. Thomas v. Deason, 289 Ga. App. 753, 658 S.E.2d 165 (2008).

Premises owner and a company that provided maintenance services for the premises were not liable for personal injuries sustained when an invitee fell in a hidden hole on a grassy median separating two parking lots in a shopping center because there was no evidence that the owner and maintenance company, which conducted regular inspections of the property, had actual or constructive knowledge of the hole. Witt v. Ben Carter Props., LLC, 303 Ga. App. 107, 692 S.E.2d 749 (2010).

Premises owner was not liable for personal injuries sustained when a pull-down staircase used to access the premises' attic detached while a contractor was using it; the owner had no knowledge of any defect in the premises causing the accident, and any such defect was not discoverable by a reasonable inspection in the exercise of ordinary care. Ferguson v. Premier Homes, Inc., 303 Ga. App. 614, 695 S.E.2d 56 (2010).

Assuming that plaintiff prison visitor was an invitee, the great weight of the evidence demanded a conclusion that defendant United States conformed to the standard of care required when visitors entered the premises. Plaintiff introduced no evidence of defendant's actual knowledge of any problem with water on the floor or the brightness of the lights in the bathroom where the plaintiff fell, and the plaintiff failed to show constructive knowledge because the alleged yellowish substance was not on the floor near the toilet long enough for the defendant in the exercise of reasonable care to have discovered the substance, defendant's reasonable inspection procedure would have negated any constructive knowledge imputed to the defendant, and the substantial weight of credible evidence required a conclusion that the lighting was more than bright enough to meet the standard of care. Tobar v. United States, 696 F. Supp. 2d 1373 (S.D. Ga. Sept. 21, 2009).

Trial court erred in denying an employer's motion for summary judgment in a guest's action to recover damages for injuries the guest sustained when an employee and an unidentified person assaulted the guest at a private party because the guest failed to come forward with evidence from which a jury could conclude that the employer had knowledge of circumstances that would lead a reasonable person to anticipate a criminal assault at the party and that the employer

had more knowledge of the possibility of such an assault than the guest had; there was no evidence that the employer had any knowledge that would have indicated the employee or any other partygoer had a propensity for violence, and there was no evidence that the employer had knowledge that violence had broken out at any similar party or gathering in the area. B-T Two, Inc. v. Bennett, 307 Ga. App. 649, 706 S.E.2d 87 (2011).

Summary judgment for a restaurant in a slip and fall case was proper and was affirmed where there was no showing that the restaurant had actual or constructive knowledge of the grease which allegedly caused the slip and fall that was superior to that of the injured person; an inspection by the restaurant manager only 5 to 10 minutes before the incident was sufficient, as a matter of law, to establish that the restaurant exercised ordinary care under O.C.G.A. § 51-3-1 to inspect the premises and keep it safe. Markham v. Schuster's Enters., Inc., 268 Ga. App. 313, 601 S.E.2d 712 (2004).

In a case brought by an injured person against a restaurant, seeking damages arising from the injured person's slip and fall in a restroom in the restaurant, summary judgment for the restaurant was reversed; the restaurant failed to show that it lacked superior knowledge of the water condition in the restroom where the restaurant knew that a toilet in an adjacent restroom had overflown onto the floor, a restaurant employee had pushed water from the adjoining restroom into the restroom at issue, the restaurant was notified by the injured person's sister that there was water everywhere, the sister's warning to the injured person stopped short of expressly extending to the inside of the restroom, and there was no warning cone placed at either the door of or inside the restroom in question. Belcher v. Ky. Fried Chicken Corp., 266 Ga. App. 556, 597 S.E.2d 604 (2004).

Constructive knowledge of dangerous condition.

Summary judgment was properly granted because the victim failed to show that the restaurant had constructive knowledge of any allegedly inadequate lighting. The victim deposed that the victim could not recall the lighting conditions in the parking lot, whereas the restaurant managers testified that the lights were working on the night in question, as indicated in daily maintenance logs. Bonner v. Southern Rest. Group, Inc., 271 Ga. App. 497, 610 S.E.2d 129 (2005).

In a slip and fall case filed by a retailer's patron alleging a breach of the retailer's duty to keep its premises reasonably safe, the trial court properly granted summary judgment to the retailer on the issue of whether the retailer's nearby employees were in a position to discover the hazard on which the patron slipped, specifically a grape on the floor; however, in the absence of clear evidence of how long the grape was present on the floor, and in the absence of evidence that the retailer actually carried out its inspection procedures, the retailer could not show as a matter of law that it lacked constructive knowledge of the hazard which caused the patron's fall. Blocker v. Wal-Mart Stores, Inc., 287 Ga. App. 588, 651 S.E.2d 845 (2007).

Approach to premises.

A resort was not liable to two injured guests in a premises liability action, and therefore was granted summary judgment since the stairs from which the guests fell leading to a beach area were not owned by the resort, and the guests failed to show that the steps were part of the approach to the resort or in any manner maintained by the resort. Harris v. Inn of Lake City, 285 Ga. App. 521, 647 S.E.2d 277 (2007).

Because the trial court correctly determined that the parking lot in which a customer fell was owned and maintained by grocery store's landlord, not by the grocery store, and was not an "approach" to the premises for purposes of O.C.G.A. § 51-3-1, the grocery store was properly granted summary judgment as to the issue of liability in a customer's personal injury suit filed against it. Robinson v. Kroger Co., 284 Ga. App. 488, 644 S.E.2d 316 (2007).

Injury on handicapped ramp. — Because the record was devoid of any evidence to show that a handicap ramp was improperly designed or constructed, pursuant to O.C.G.A. § 51-3-1, a company had no duty to an invitee; consequently, the company was entitled to summary

judgment in the invitee's action for slip and fall damages. Gibson v. Symbion, Inc., 277 Ga. App. 721, 627 S.E.2d 84 (2006).

Evidence of criminal activity.

In an action for injuries resulting from a fight in the parking lot of a nightclub, where plaintiffs were unable to show superior knowledge on behalf of the owner of the leasehold and operator of the nightclub, defendants were entitled to summary judgment. Habersham Venture, Ltd. v. Breedlove, 244 Ga. App. 407, 535 S.E.2d 788 (2000).

In a customer's personal injury action, a property owner was properly granted summary judgment, as it had no duty to foresee any danger from its criminally damaged pay phone falling on the customer's head, the way the injury occurred was not reasonably expected, and due to the fact that such could not occur except from the customer's unexpected acts. McAfee v. ETS Payphones, Inc., 283 Ga. App. 756, 642 S.E.2d 422 (2007).

Under O.C.G.A. § 51-3-1, a bar owner was not liable for a customer's shooting of the bar's patrons unless this crime was foreseeable and the owner did not exercise ordinary care to prevent the crime. As crimes occurring outside the bar, and the theft of a customer's wallet inside the bar, did not give the owner notice sufficient to call the owner's attention to the danger of violence in the bar, evidence of those crimes was not admissible. Vega v. La Movida, Inc., 294 Ga. App. 311, 670 S.E.2d 116 (2008).

Premises liability did not fall onto licensee having no control over conditions of the premises. — In a premises liability action, the trial court properly granted summary judgment to a participant in a contest held by a licensee, without considering the question of whether the participant assumed the risk of falling by participating in a jump-rope in a suit and dress shoes, as that participant failed to show that the licensee had control over the condition of the premises where the contest was held, and had superior knowledge of the hazard or defect which allegedly caused the participant's injuries. Dixon v. Infinity Broad. East, Inc., 289 Ga. App. 71, 656 S.E.2d 211 (2007).

Owner's liability for dangerous condition created by third person.

In a premise liability action, because questions of fact remained as to whether a student was a university's invitee at the time the student was shot, on what was alleged to be the university's property at the time of the assault, and thus, whether the university owed the student a duty of ordinary care, and no evidence was presented that the student lost an "invitee" status, summary judgment in the university's favor was reversed. Clark Atlanta Univ., Inc. v. Williams, 288 Ga. App. 180, 654 S.E.2d 402 (2007), cert. denied, 2008 Ga. LEXIS 227 (Ga. 2008).

Proprietor's duty to control actions of third persons.

Two patrons sued a bar owner after the patrons were shot by another customer, alleging the owner negligently failed to provide adequate security inside the bar. Defense counsel argued that as the patrons knew their assailant, their knowledge of the danger the assailant posed was greater than the owner's, but the patrons failed to exercise ordinary care to avoid the danger, and since these facts were a defense to the negligence charge, counsel's comments were proper. Vega v. La Movida, Inc., 294 Ga. App. 311, 670 S.E.2d 116 (2008).

Liability of general contractor. — A general contractor had a non-delegable duty to keep the premises and approaches to houses under construction safe and was liable for the acts or omissions of its independent contractors in this regard. Kaplan v. Pulte Home Corp., 245 Ga. App. 286, 537 S.E.2d 727 (2000).

Temporary possession by independent contractor. — Although there was evidence that the subsidiary companies owned the project premises or had employees or agents on the premises, the trial court did not err by directing a verdict in their favor pursuant to O.C.G.A. § 9-11-50(a) because when a property owner or occupier surrendered temporary possession and control of the property to an independent contractor to perform work on the property, the owner/occupier was generally not liable under O.C.G.A. § 51-3-1 for injuries sustained on the property by the contractor's invitees due

to unsafe working conditions on the premises which the owner/occupier had no right to control. The record showed that the subsidiary companies surrendered possession and control of the project premises to the independent contractor to perform the work as an independent contractor, that none of the defendants interfered with the independent contractor's status as an independent contractor, and that the independent contractor had the duty to keep the project premises safe for its invitees; therefore, there was no evidence that the subsidiary companies had a duty under O.C.G.A. § 51-3-1 to keep the project premises safe. Ramcke v. Ga. Power Co., 306 Ga. App. 736, 703 S.E.2d 13 (2010), cert. denied, No. S11C0482, 2011 Ga. LEXIS 583 (Ga. 2011).

Jury to determine status as licensee or invitee when property for sale. — Trial court erred in granting an electric company's motion for summary judgment in a visitor's personal injury action alleging that the company negligently maintained and inspected electrical wire the company had installed on private property because the jury had to decide whether the visitor was a licensee or an invitee and then consider the company's liability as occupier of the premises under the appropriate premises liability standard; a jury could find that the visitor was an invitee rather than a licensee because there was evidence that the visitor was looking at real property that was being offered for sale, that the property owner received the benefit of a potential sale from the visit to the property, but there was also evidence that the visitor was a licensee. McGarity v. Hart Elec. Mbrshp. Corp., 307 Ga. App. 739, 706 S.E.2d 676 (2011).

4. Ordinary Care Standard

Owner must not create or maintain dangerous condition.

Because an injured person provided no evidence, in responding to a summary judgment motion, that an ordinarily prudent operator of an outdoor establishment would have applied a urethane coating to wood handrails installed outside and would not have pressure washed them, summary judgment in favor of a park, an authority, and a city was proper in the injured person's claim seeking damages for getting a splinter from a bridge handrail. Hamblin v. City of Albany, 272 Ga. App. 246, 612 S.E.2d 69 (2005).

Duty Owed to Children

Child entering store to use restroom deemed licensee, not invitee. — In a parent's suit as a next friend to the parent's daughter, the trial court erred in denying summary judgment to a retailer and its employees on the parent's claim of tortious misconduct, as no evidence was presented that the child victim was the retailer's business invitee, but was merely a licensee under both O.C.G.A. §§ 51-3-1 and 51-3-2, as the child merely entered the business with the sole intent to use the restroom; however, summary judgment was properly denied as to the invasion of privacy, intentional infliction of emotional distress, false imprisonment, false arrest and damages claims filed by the parent against the defendants. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Landowners duty to child as to latent construction defects. — Trial court erred in granting summary judgment to the property owners in a negligence claim because genuine issues of material fact remained as to whether the property owners violated applicable building codes in the construction of their deck, whether they exercised ordinary care in preventing injury to their guests from a defect in the deck or showed such indifference to the consequences as to justify a finding of wantonness, and whether an injured child had equal knowledge of the hazard and failed to exercise ordinary care for the child's own safety. Hicks v. Walker, 262 Ga. App. 216, 585 S.E.2d 83 (2003).

Commercial Sales Establishments

Knowledge of a puddle of water surrounded by ice.

Because no evidence was presented that a hardware store had actual knowledge that a hazard existed, summary judgment for the hardware store was proper in a

claim for damages arising from an incident where a box fell on a customer at the hardware store. Green v. Home Depot U.S.A., Inc., 277 Ga. App. 779, 627 S.E.2d 836 (2006).

Criminal activity in parking lot. — A judgment in favor of a customer in a premises liability action was upheld on appeal as the customer established that the retailer breached the duty of care owed to the customer when the customer was robbed of the customer's car and shot in the retailer's parking lot and that the retailer had foreseeable knowledge of such criminal activity. Wal-Mart Stores, Inc. v. Lee, 290 Ga. App. 541, 659 S.E.2d 905 (2008).

Admission of evidence of prior criminal activity in retailer's parking lot. — In a premises liability action brought by a customer against a retailer involving an occurrence wherein the customer was carjacked and shot in the retailer's parking lot, the trial court did not abuse the court's discretion by allowing into evidence prior incidents of criminal activity at the retailer's premises as, considering the location, nature, and extent of those prior criminal occurrences and their likeness to the incident involving the customer, the other occurrences were sufficiently similar. While there was no evidence of a prior incident in which the victim was shot and the victim's car was taken at gunpoint, such as what had occurred to the customer, the prior criminal occurrences did not need to be identical to the one involving the customer and there were several robberies and assaults with a deadly weapon upon the premises, as well as thefts of and from vehicles in the retailer's parking lot, which showed that it was reasonable to anticipate that an unauthorized entry into a vehicle might occur when the driver was nearby and that personal harm to the driver would result. Wal-Mart Stores, Inc. v. Lee, 290 Ga. App. 541, 659 S.E.2d 905 (2008).

Rubber mat in front of store. — In a case in which a customer sued a store after the customer tripped on a rubber mat outside the store's entrance, the trial court erred in granting summary judgment for the store since genuine issues of material fact existed as to whether the store lacked superior knowledge of the hazard posed by the mat that caused the customer to trip and fall. Benefield v. Tominich, 308 Ga. App. 605, 708 S.E.2d 563 (2011).

Store shelf corner. — A customer who tripped and fell when the customer's pants cuff caught the outer corner of a store shelf was not entitled to recover against the store based on premises liability under O.C.G.A. § 51-3-1; the customer made the turn at issue many times before and did so while observing the hazard of which the customer complained, and given that the customer was able to observe the shelf corner for ten seconds before falling, the shelf corner was an open and obvious condition of which the customer had at least equal knowledge and could have avoided in the exercise of ordinary care. Wright v. K-Mart Corp., 286 Ga. App. 765, 650 S.E.2d 300 (2007), cert. denied, 2008 Ga. LEXIS 124 (Ga. 2008).

Openly visible static condition.

Trial court properly found that a shopping center curb where an injured person fell was an open and obvious static condition and that the injured person failed to exercise reasonable care for safety; pursuant to O.C.G.A. § 51-3-1, the trial court properly granted summary judgment for the defendants in the injured person's claim because the injured person failed to show that the curb was negligently designed, constructed, maintained, or difficult to see, and contended only that the injured person failed to appreciate the height of the curb. Pirkle v. Robson Crossing, LLC, 272 Ga. App. 259, 612 S.E.2d 83 (2005).

Trial court did not err in granting a store owner summary judgment in a customer's action to recover damages for injuries the customer sustained when the customer fell from a curb in the store's parking lot because the customer had equal knowledge of any hazard presented by the height of the curb; even if the curbed sidewalk was hazardous, the condition was open and obvious and, thus, in the exercise of ordinary care, the customer could have avoided the hazard. McLemore v. Genuine Parts Co., 313 Ga. App. 641, 722 S.E.2d 366 (2012).

Because a customer did not testify that the purported distraction of people attending a tool show in any way obstructed the customer's view of a curb, the proof offered clearly put the case within the line of cases involving the plain view doctrine and effectively eliminated any distraction theory. McLemore v. Genuine Parts Co., 313 Ga. App. 641, 722 S.E.2d 366 (2012).

Unruly bar patron.

There was sufficient evidence from which the jury could have concluded that a fight resulting in a bar patron's injuries was foreseeable and could have been avoided if the bar and the bar's owner had banished the patrons involved in the fight based on their duty to the patron, O.C.G.A. § 51-3-1. The patrons involved in the fight were chronically combative, had been banished on previous occasions, and were hostile and combative for hours before the subject fight. Mulligan's Bar & Grill v. Stanfield, 294 Ga. App. 250, 668 S.E.2d 874 (2008), cert. denied, No. S09C0351, 2009 Ga. LEXIS 192 (Ga. 2009).

Customer must exercise ordinary care for own safety, etc.

Trial court did not err in granting a lessee's motion for summary judgment in a customer's premises liability action under O.C.G.A. § 51-3-1 to recover damages for injuries the customer sustained when the customer fell down stairs in a shop because the customer failed to exercise ordinary care for the customer's own safety pursuant to O.C.G.A. § 51-11-7; despite the customer's inability to see beyond the merchandise, the customer continued to move in that direction, and the customer's attempt to walk between or over the thick clutter of merchandise, when there was not an aisle or clear area of floor visible, constituted a voluntary departure from the route designated and maintained by the lessee for customers' safety and convenience and imposed a heightened duty of care for the customer's own safety. Bartlett v. McDonough Bedding Co., 313 Ga. App. 657, 722 S.E.2d 380 (2012).

Presence of foreign substance on floor.

Summary judgment for an employer was affirmed on an employee's premises liability negligence claim as no one, including the employee, saw any foreign substance or other matter on the floor and no one, including the employee, had any idea what caused the slip and fall; without evidence of the existence of a foreign substance that somehow caused a fall, there could be no evidence that the employer had any knowledge of the alleged danger. Chapman v. C.C. Dickson Co., 273 Ga. App. 640, 616 S.E.2d 478 (2005).

In a premises liability action against a retailer, because the patron failed to show proof that a single employee of the retailer was in the immediate area of the spill that allegedly caused the patron's fall, and could have easily seen and removed the spill prior to the slip and fall, or proof that the liquid had been there for a sufficient length of time that the retailer should have discovered and removed the spill during a reasonable inspection and: (1) inasmuch as the purported hazard was not readily visible to the patron; and (2) the patron failed to establish that the retailer's employees, who were at least 20 to 30 feet away, could have easily seen and removed the spill, or that the liquid had been on the retailer's floor long enough that the retailer should have discovered and removed the spill during a reasonable inspection, the trial court erred in denying the retailer's motion for summary judgment as to the retailer's liability to the patron. Kmart Corp. v. McCollum, 290 Ga. App. 551, 659 S.E.2d 913 (2008).

Store's motion for summary judgment in a patron's personal injury suit was denied because there existed genuine issues of disputed fact as to whether the store exercised reasonable care as required under O.C.G.A. § 51-3-1; there was conflicting evidence on the issue of the store's constructive knowledge of an alleged puddle of cooking oil on the floor since the store's evidence showed that the store's assistant manager inspected the floor about 10 minutes before the patron fell, and the patron testified that the patron was in the aisle for five to 10 minutes before falling, the patron did not see the assistant manager, and the assistant manager had to be called down from an upstairs office at the back of the building when the patron reported the incident.

Williams v. Big Lots Stores, Inc., No. 1:07-CV-1593-TWT, 2008 U.S. Dist. LEXIS 57648 (N.D. Ga. July 28, 2008).

Presence of water on floor.

Owner of mall was not negligent as a matter of law where it had less than 90 seconds to clean up water spilled on the floor prior to plaintiff's fall. Pickering Corp. v. Goodwin, 243 Ga. App. 831, 534 S.E.2d 518 (2000).

Presence of chicken blood and water on floor. — Because genuine material fact issues remained as to whether a supermarket's inspection procedures in the area in which a customer fell were reasonable and whether a reasonable inspection procedure would have detected a mixture of chicken blood and water on the floor, summary judgment in favor of the supermarket was reversed; moreover, the appeals court rejected the supermarket's claim that the customer had equal knowledge of the hazard since the customer had previously walked down the aisle before the customer fell there. Food Lion, LLC v. Walker, 290 Ga. App. 574, 660 S.E.2d 426 (2008).

Proprietor's knowledge must be alleged and shown.

Pawn shop was entitled to summary judgment in plaintiff's personal injury action arising out of an injury caused by a saw, as the pawn shop did not breach its duty to inspect under O.C.G.A. § 51-3-1; the pawn shop's inspection of the saw, which included determining whether it operated properly, did not reveal the defect that caused it to turn immediately upon being plugged in. Walker v. Bruhn, 281 Ga. App. 149, 635 S.E.2d 322 (2006).

Patron's claims for damages for personal injuries allegedly sustained when she removed a bread maker from a merchant's shelf and several crock pots fell from another shelf failed because the patron failed to show, in accordance with O.C.G.A. § 51-3-1, that the merchant was actually or constructively aware of the allegedly perilous display of cookware; the patron presented no evidence that an employee of the merchant was in the immediate vicinity at the time of the incident and in a position to see and remove the danger, she did not offer evidence that the alleged hazard had existed for any significant amount of time prior to the incident, there was no evidence of prior incidents that might have put the merchant on notice of the hazard, and the merchant submitted evidence that all of its employees were trained to patrol the aisles and check for unsafe conditions and that one of its employees had walked through the aisle where the incident occurred shortly before and did not observe anything out of the ordinary. Gootee v. Target Corp., 256 Fed. Appx. 253 (11th Cir. 2007) (Unpublished).

Father's suit to recover damages for personal injuries suffered by his minor son when a metal pamphlet rack fell on his foot in a retail store was properly dismissed on summary judgment; the father failed to show that the retailer breached its duty of care under O.C.G.A. § 51-3-1, as there was no evidence that the retailer had actual knowledge of any defect in the rack, no constructive knowledge could be imputed to the retailer even if the rack was defectively constructed or installed, the retailer could not have easily seen and eliminated the hazardous condition, the father did not offer any evidence that the defect existed a sufficient length of time that the retailer should have discovered it during a reasonable inspection, and because there was no record evidence indicating that the retailer constructed the rack, no presumption existed that the retailer knew of the defect. Jones v. Wal-Mart Stores, Inc., 256 Fed. Appx. 292 (11th Cir. 2007) (Unpublished).

Proprietor has no duty to know of all possible dangers caused by third persons.

The trial court properly granted summary judgment to a retailer, in a customer's negligence action filed against it for injuries sustained when a tomato tower punctured an eye, as the customer's injury arose out of a third party's actions which the retailer did not and could not have foreseen, and hence no evidence was presented that it breached a duty owed to the customer. Thomas v. Home Depot, U.S.A., Inc., 284 Ga. App. 699, 644 S.E.2d 538 (2007).

Adequacy of inspection procedures questioned. — Store's motion for sum-

mary judgment in a patron's personal injury suit was denied because there existed genuine issues of disputed fact as to whether the store exercised reasonable care as required under O.C.G.A. § 51-3-1; the adequacy of the store's inspection procedure, which required inspection every two hours, could not be decided as a matter of law since there was evidence that the procedure was not followed, and there was further conflicting evidence on the issue of the store's constructive knowledge of an alleged puddle of cooking oil on the floor. Williams v. Big Lots Stores, Inc., No. 1:07-CV-1593-TWT, 2008 U.S. Dist. LEXIS 57648 (N.D. Ga. July 28, 2008).

Inspection of electrical wires. — Jury issue was presented as to whether an electric company exercised ordinary care to keep premises safe because it could not be concluded as a matter of law that the company's inspection procedure was reasonable when there was evidence that an electrical wire presented a safety hazard, that the wire should have been covered with a junction box and placed on a concrete pad, and that at the time of a visitor's injury the wire was not, and there was no evidence that any inspection was performed for at least five years between the initial post-installation inspection and the incident; a jury could find without expert testimony that the company had a duty to conduct more frequent inspections to ensure that the company's live electrical wires were not left uncovered from the evidence presented, and a jury could conclude that the company was negligent in failing to discover the exposed live wire through more frequent inspection of the company's equipment. McGarity v. Hart Elec. Mbrshp. Corp., 307 Ga. App. 739, 706 S.E.2d 676 (2011).

Jury instructions. — In a personal injury action filed against an invitee against a commercial premises owner, the invitee's request that the trial court instruct the jury that an owner would be considered to have constructive knowledge of a foreign substance if it was shown that the owner did not have in place, or did not follow, a reasonable inspection procedure at the time of the incident, was properly denied, as the quoted portion of the requested charge was incorrect. Taylor v. AmericasMart Real Estate, LLC, 287 Ga. App. 555, 651 S.E.2d 754 (2007).

Home, Apartment, and Landowners

Ordinary care standard applicable to homeowners.

In this personal injury action, the granting of summary judgment to the defendants was affirmed because the plaintiff's knowledge of icy conditions in the defendants' driveway at the time of the incident was at least equal, if not superior to that of the defendants; the plaintiff walked across the driveway four times. Kouche v. Farr, 317 Ga. App. 277, 730 S.E.2d 45 (2012).

Landowner's liability.

Summary judgment was properly denied to a trailer park owner in a premises liability action based upon the murder of a tenant in the park since the owner had a duty to provide security to the park as a result of a contract it entered with all residents and failed to inform the residents that security was discontinued. Brookview Holdings, LLC v. Suarez, 285 Ga. App. 90, 645 S.E.2d 559, cert. denied, 285 Ga. App. 90, 645 S.E.2d 559 (2007).

No evidence of constructive knowledge.

Homeowners' summary judgment motion should have been granted as they had no actual or constructive notice of a problem with a deck that collapsed, injuring the injured party; the home had been inspected one year earlier, and no problem with the deck was identified, although the inspection report indicated that the deck was not bolted to the house. Nailing a deck to a house was acceptable at the time of the inspection. Wingo v. Harrison, 268 Ga. App. 156, 601 S.E.2d 507 (2004).

Homeowner was not liable under O.C.G.A. § 51-3-1 to a contractor hired to clean pine straw on the homeowner's roof when the contractor rested the contractor's foot on an awning which gave way, leading to a fall and injuries, because there was no evidence that the owner had any knowledge, actual or constructive, of the defective attachment of the awning to the home. Sipple v. Newman, 313 Ga. App. 688, 722 S.E.2d 348 (2012).

Abandoned well. — While the landowners were told about an abandoned well

on their property, they did not know where the well was, and nothing indicated where the well was; further, nothing indicated that the well was defectively covered rather than filled, and thus the landowners had no duty to inspect the property to locate the well or to inform an invitee of its existence. Sisson v. Elliott, 278 Ga. App. 156, 628 S.E.2d 232 (2006).

Control of property relinquished.

Nothing prohibited a landlord from assigning by contract its duty to repair and maintain the premises. Rainey v. 1600 Peachtree L.L.C., 255 Ga. App. 299, 565 S.E.2d 517 (2002).

In a premises liability action filed by a repairman arising from injuries suffered while repairing a roof, because the trial court properly found that an out-of-possession landlord and its tenants who surrendered control of the owned premises did not ratify the repairman's employer's actions in not providing safety equipment, and did not have superior knowledge of the dangers involved, the out-of-possession landlord and its tenants were properly granted summary judgment in the repairman's premises liability action. Saunders v. Indus. Metals & Surplus, Inc., 285 Ga. App. 415, 646 S.E.2d 294 (2007), cert. denied, 2007 Ga. LEXIS 624 (Ga. 2007).

The owner of an apartment building where an invitee was injured when a breezeway railing broke was not entitled to summary judgment on the theory that the owner was not liable for the negligent acts of the independent contractors who installed or inspected the railing during a renovation project; the owner had a nondelegable duty to keep its premises safe for the invitee and a material fact question existed as to whether the owner had given full and complete control to the independent contractors such that the owner was relieved of its duty to the invitee. Carpenter v. Sun Valley Props., LLC, 285 Ga. App. 1, 645 S.E.2d 35, cert. denied, 2007 Ga. LEXIS 563 (Ga. 2007).

Apartment owner's liability for crimes of others.

Trial court properly granted summary judgment to an apartment complex owner, and against the decedent's personal representative, in the latter's premises liability action against the former, as: (1) evidence was lacking that the vacant apartment where the decedent was murdered was negligently left unlocked; and (2) despite the criminal history of the area where the apartment was located, the owner had no reasonable belief to anticipate that a murder would have occurred on its premises; moreover, guesses or speculation which raised merely a conjecture or possibility were insufficient to create even an inference of fact for consideration on summary judgment. Wojcik v. Windmill Lake Apts., Inc., 284 Ga. App. 766, 645 S.E.2d 1 (2007), cert. denied, 2007 Ga. LEXIS 637 (Ga. 2007).

Lessor entitled to summary judgment. — In a wrongful death action filed by a decedent-lessee's administrator in which the decedent was killed when crossing a public highway that the lessor did not control, the lessor was properly granted summary judgment, as the administrator failed to show that the lessor was negligent per se or that the lessor breached either a common law or private duty owed to the lessee. Walton v. UCC X, Inc., 282 Ga. App. 847, 640 S.E.2d 325 (2006).

Decedent's own actions led to dangerous situation. — An apartment complex and its property manager were erroneously denied summary judgment in a wrongful death action filed against them by the decedent's estate, as neither defendant had superior knowledge that a criminal act would be committed on the premises, and because the decedent's own actions led to the dangerous situation regarding apprehension by bail bondsmen and the decedent failed to exercise ordinary care under the circumstances. Gateway Atlanta Apts., Inc. v. Harris, 290 Ga. App. 772, 660 S.E.2d 750 (2008).

Liability for acts of employees. — Under O.C.G.A. § 51-3-1, a landowner can be liable for third-party criminal attacks if the landowner has reasonable grounds to apprehend that such a criminal act would be committed but fails to take steps to guard against injury. Constructive knowledge of danger is sufficient to establish liability; a series of unforced entries and burglaries since a certain employee was hired by an apartment com-

plex, the complex's knowledge that residents suspected an employee, and the fact that the employee was discovered in an apartment without authorization was sufficient to defeat a directed verdict motion on a claim against the complex after an individual was attacked and killed by an employee of the complex. TGM Ashley Lakes, Inc. v. Jennings, 264 Ga. App. 456, 590 S.E.2d 807 (2003).

Apartment complex leasing agent. — Because a minor child was bitten by another tenant's dog, an action by the parent of the child against the owner of the apartment complex and its leasing agent resulted in summary judgment against the parent, as the out-of-possession landlord's only liability to third persons was that of O.C.G.A. § 44-7-14, which was inapplicable; there was no showing that either the owner or agent had any type of knowledge of the dog's propensities or viciousness, and the agent was therefore not shown to be liable on any claim arising under O.C.G.A. § 51-3-1. Griffiths v. Rowe Props., 271 Ga. App. 344, 609 S.E.2d 690 (2005).

Summary Judgment Inappropriate

Issues of fact as to association of asphalt plant and convenience store frequented by employees where decedent/employee was shot and killed. — In a wrongful death action, a trial court did not err by denying a corporate officer's motion for summary judgment because a genuine issue of fact existed as to whether the corporate officer was the owner/operator of the convenience store where the decedent was shot and killed. Dixie Roadbuilders, Inc. v. Sallet, 318 Ga. App. 228, 733 S.E.2d 511 (2012).

Tenant's duty does not include landlord's parking lot. — Trial court erred in denying tenant's motion for summary judgment in the invitee's slip and fall case against the tenant, as no dispute existed but that the invitee fell in the landlord-owned and maintained parking lot, and not in an area where the tenant owed a duty to exercise ordinary care for the invitee's safety, such as an "approach" to its store, which included the area up to and including the sidewalk in front of the tenant's store. Food Lion, Inc. v. Isaac, 261 Ga. App. 311, 582 S.E.2d 476 (2003).

In a personal injury action arising out of a slip and fall, because jury questions existed as to whether a premises owner's inspection procedure was reasonable, the appeals court refused to say that the owner lacked constructive knowledge of a hazard that allegedly caused a slip and fall as a matter of law. Thus, summary judgment entered in favor of the owner was reversed. Gibson v. Halpern Enters., 288 Ga. App. 790, 655 S.E.2d 624 (2007).

When premises owner was deemed to have superior knowledge of the hazard that was alleged to have caused the slip and fall, based on the testimony of the injured patron's daughter that the owner had actual knowledge of the hazard, summary judgment in the owner's favor was unauthorized, and the appeals court erred in finding otherwise. Dickerson v. Guest Servs. Co., 282 Ga. 771, 653 S.E.2d 699 (2007).

Injured party had equal knowledge of danger from alligators. — Court of appeals erred in affirming an order denying the owners of a planned residential development summary judgment in an estate's premises liability action because a guest had equal knowledge of the threat of alligators within the community; although the guest knew that the wild alligators were dangerous, the guest chose to go for a walk at night near a lagoon in a community in which the guest knew wild alligators were present. Landings Ass'n v. Williams, 291 Ga. 397, 728 S.E.2d 577 (2012).

Injured party's knowledge of particular hazard not established. — In a suit in which an injured party alleged liability based on static hazards, including design defects, and the failure to warn of those defects, whether it was reasonably foreseeable that the injured party would plummet over nine feet into the bottom of an unguarded hole while attempting to use a dumpster was a jury question; it could not be inferred from the evidence that the injured party often "used" a landfill and a particular dumpster and, thus, that the injured party knew or should have known about the particular hazard. Barton v. City of Rome, 271 Ga. App. 858, 610 S.E.2d 566 (2005).

Trial court erred in denying an employer's summary judgment motion on premises liability claims filed by a group of female employees claiming that a manager's act of installing a video surveillance system in a women's restroom was an intentional act and premises liability sounded in negligence; further, the women's prayers for mental anguish amounted to claims for negligent infliction of emotional distress and the women suffered no physical impact. Johnson v. Allen, 272 Ga. App. 861, 613 S.E.2d 657 (2005).

Summary judgment for an owner of a gas station was reversed as jury issues were created as to: (1) whether the customer had actual knowledge that an uncoiled hose in the parking lot ran to the passenger's side of the customer's car; (2) whether the customer should have also known that the hose ran to the passenger's side; (3) whether the hose was a large object that was in plain view at a location where it was customarily found and expected to be so that the customer should have seen or at least anticipated the hose in the exercise of ordinary care; and (4) whether the customer failed to exercise ordinary care by stepping off the curb without looking. Ward v. Autry Petroleum Co., 281 Ga. App. 877, 637 S.E.2d 483 (2006), cert. denied, 2007 Ga. LEXIS 158 (Ga. 2007).

When a worker was injured by falling through an opening on the second story of a house, it was error to grant summary judgment to the house's buyers and sellers in a suit under O.C.G.A. § 51-3-1; the worker's admission that the worker would have seen the opening had the worker looked up while ascending stairs did not establish as a matter of law a failure to exercise ordinary care, as the worker testified that the worker was looking at the worker's feet because the stairs were narrow and that when the worker had been in the house previously, the opening was not there. Britton v. Farmer, 283 Ga. App. 733, 642 S.E.2d 415 (2007).

Liability for slip and fall on ice. — In a premises liability action arising from a slip and fall on ice by an injured lessee, because jury issues existed as to whether the party exercised the requisite care, and as to the premises owner's knowledge of the hazard, the trial court erred in granting summary judgment to the owner and an insurer and in reasoning that the lessee failed to exercise due care. Little v. Alliance Fire Prot., Inc., 291 Ga. App. 116, 661 S.E.2d 173 (2008).

Liability for fall on A-frame "wet floor" sign. — Theater patron tripped and fell on an A-frame "Wet Floor" sign that had been knocked to the floor. As the theater knew that the sign was present, and in view of evidence presented by the patron that these types of signs tended to collapse on contact with moving crowds, were a tripping hazard when knocked over, and should not be used in high-traffic areas, the theater was not entitled to summary judgment on the patron's premises liability claim. Am. Multi-Cinema, Inc. v. Brown, 285 Ga. 442, 679 S.E.2d 25 (2009).

Liability for fall on wet floor. — Summary judgment was denied to defendant premises owner because: (1) plaintiff customer presented sufficient evidence to show that defendant had knowledge of a hazardous condition — water on the floor — because the floor was mopped 15 minutes prior to plaintiff's fall and a wet-floor cone had been located near the fall; (2) the evidence was not conclusive that plaintiff had equal or superior knowledge of the hazard or that the plaintiff failed to use reasonable care for the plaintiff's own safety; (3) there was a question of fact concerning whether rainy conditions caused or contributed to the hazard such that the defendant would prevail on the defendant's "rainy day" defense; and (4) it was unclear whether the plaintiff was on notice of the wet floor hazard prior to the plaintiff's fall. Ahuja v. Cumberland Mall, LLC, No. 1:10-CV-1038-JEC, 2011 U.S. Dist. LEXIS 109587 (N.D. Ga. Sept. 23, 2011).

Foreseeability issue. — In a customer's premises liability action, because factual issues existed as to whether a retailer knew or should have known of a hazardous condition when it left a rolled-up carpet mat leaning on its end in the produce department, and whether the retailer could foresee that it would be knocked over and become a tripping hazard, summary judgment in favor of the retailer,

and against the customer, was reversed. Freeman v. Wal-Mart Stores, Inc., 281 Ga. App. 132, 635 S.E.2d 399 (2006).

A trial court erred by granting summary judgment to the owners of a restaurant in which a suing customer slipped and fell because there was evidence that three employees were within a few feet of the area where the customer fell and could have easily seen and removed the hazard; thus, a genuine issue of fact arose as to whether the owners had constructive knowledge of the sticky substance on the floor that the customer slipped on. Somers v. M.A.U., Inc., 289 Ga. App. 731, 658 S.E.2d 242 (2008).

The trial court erred by granting summary judgment to the owners of a restaurant in which a suing customer slipped and fell because there was evidence that three employees were within a few feet of the area where the customer fell and could have easily seen and removed the hazard; thus, a genuine issue of fact arose as to whether the owners had constructive knowledge of the sticky substance on the floor that the customer slipped on. Somers v. M.A.U., Inc., 289 Ga. App. 731, 658 S.E.2d 242 (2008).

Because the evidence and the inferences permitted the conclusion that defendants controlled the premises and should have foreseen a victim's rape at a party in a recording studio, summary judgment on a theory of premises liability was not warranted. There was evidence that while the rape was occurring, an affiliate of the recording label that paid for the use of the studio knocked on the door and was asked to guard the door; a jury could infer that the affiliate, a representative of the label, had prior knowledge that the rapist was going to attack the victim or had previously attacked other women in a similar fashion. Westmoreland v. Williams, 292 Ga. App. 359, 665 S.E.2d 30 (2008), cert. denied, 2008 Ga. LEXIS 890 (Ga. 2008).

Trial court erred by granting summary judgment to a restaurant owner in a slip and fall case because the customer who fell in the parking lot introduced evidence to show that the owner failed to follow the owner's established inspection schedule, thereby raising an inference that the owner had constructive knowledge of the wooden object the customer fell from; thus, summary judgment was inappropriate. Samuels v. CBOCS, Inc., 319 Ga. App. 421, 734 S.E.2d 758 (2012).

Grant of summary judgment was reversed because although there was no allegation that the company had actual knowledge of the stick in the parking lot, the customer introduced evidence to show that the company failed to follow the company's established inspection schedule, thereby raising an inference that the company had constructive knowledge of the object. Samuels v. CBOCS, Inc., 319 Ga. App. 421, 734 S.E.2d 758 (2012).

Slip and fall issues had to be determined by jury. — Trial court erred in granting a grocery store summary judgment in a customer's premises liability action seeking to recover damages for injuries the customer sustained when the customer fell in the store's restroom because the case presented the typical slip and fall case issues that had to be determined by a jury since the customer testified to slipping on water on the floor that the customer could only detect after the customer fell, and the testimony was supported by that of the person who was with the customer and also to some extent by the store's assistant manager; whether the water on the floor was open and obvious was a jury question given the conflicting testimony on whether the water could be seen, and whether the customer failed to exercise ordinary care for the customer's own safety because the customer had previously walked through the water on the floor was also an issue the jury had to decide. Mairs v. Whole Foods Mkt. Group, Inc., 303 Ga. App. 638, 694 S.E.2d 129 (2010).

Trial court erred by granting summary judgment for defendant bus station in a premises liability suit under O.C.G.A. § 51-3-1 brought by plaintiff customer who was attacked after a verbal altercation. Because the evidence was not plain, palpable, and undisputed, issues concerning the bus station's negligence and the customer's lack of ordinary care for personal safety were not susceptible to summary adjudication. Bennett v. Metro. Atlanta Rapid Transit Auth., 316 Ga. App. 565, 730 S.E.2d 52 (2012).

Independent Contractors

Burden of proving the surrender of possession and control of the property to an independent contractor is on the property owner. Hess v. Textron Auto. Exteriors, Inc., 245 Ga. App. 264, 536 S.E.2d 291 (2000).

When a general contractor has received full and complete possession of an area for construction, reasonable care may require that he constantly monitor the site for risk of danger to others or erect barriers to prevent others from traveling into areas where they may be exposed to danger. Such responsibility may extend even to portions of the site being worked upon by subcontractors. Bartlett v. Holder Constr. Co., 244 Ga. App. 397, 535 S.E.2d 537 (2000).

Slip and fall. — The defendant was not entitled to immunity in a slip and fall case, notwithstanding its assertion that the fall was caused by the actions of an independent contractor, as the duty imposed on owner/occupiers to exercise ordinary care in keeping the premises and approaches safe is statutory and, therefore, the defendant was liable for the acts and omissions of its independent contractor. Kroger Co. v. Strickland, 248 Ga. App. 613, 548 S.E.2d 375 (2001).

In a slip and fall case, the trial court properly granted summary judgment to a premises owner on grounds that: (1) no material issue of fact remained as to whether a roof repair contractor's injuries were caused by the owner's failure to keep the subject premises safe; (2) the contractor failed to present any evidence that a foreign substance or any unusual hazard on the roof surface caused the fall; (3) it was not raining on the day of the fall; and (4) prior to the fall, the contractor inspected the roof by walking the length of it and looking at it from below, satisfied that the area was safe. Hardnett v. Silvey, 285 Ga. App. 424, 646 S.E.2d 514 (2007).

In a slip and fall action filed by a mall patron against the mall's owner and its cleaning contractor, summary judgment was properly granted to the latter, as no evidence was presented that it wrongfully failed to clean the spot on which the patron slipped; however, summary judgment in the owner's favor was reversed, as it failed to present evidence of any reasonable inspection procedures, giving the patron the benefit of an inference of the owner's constructive knowledge of a hazard. Prescott v. Colonial Props. Trust, Inc., 283 Ga. App. 753, 642 S.E.2d 425 (2007).

The court of appeals upheld an order granting summary judgment to a janitorial services company on claims filed against it by a premises owner's invitee for damages sustained by the invitee resulting from a slip and fall on the owner's premises, as the janitorial services company was an independent contractor and not an owner occupier of the premises where the invitee fell, and hence it owed no contractual duty to the invitee. Taylor v. AmericasMart Real Estate, LLC, 287 Ga. App. 555, 651 S.E.2d 754 (2007).

Provider of janitorial services to a hospital was not negligent, pursuant to O.C.G.A. § 51-3-1 under a theory of premises liability, for a hospital employee's slip and fall because the provider was an independent contractor. The hospital's reservation of rights to ensure that provider carried out its obligations did not demonstrate that hospital directed or controlled the provider's work. Perkins v. Compass Group USA, Inc., 512 F. Supp. 2d 1296 (N.D. Ga. Mar. 7, 2007).

In an employee's slip and fall action against the employer's cleaning service for negligent application of furniture polish, the trial court correctly instructed the jury that the service did not have an independent duty under O.C.G.A. § 51-3-1 like an owner/occupier to inspect the premises for the safety of the employee's invitees. Williams v. Capitol Corporate Cleaning, Inc., 313 Ga. App. 61, 720 S.E.2d 228 (2011).

Landowners duty to warn of latent defects. — Evidence of nonconformity with Occupational Safety & Health Act (OSHA), 29 U.S.C. § 651 et seq., standards is admissible as proof of a landowner's superior knowledge of a defect in the premises under O.C.G.A. § 51-3-1; thus, the trial court did not err in admitting evidence of the landowner's OSHA violations, even though plaintiff welder worked for a contractor and not directly for the landowner when the plaintiff was injured on the landowner's property. The personal

injury verdict for the welder was reversed, however, based on an improper instruction that failed to clarify for the jury that the landowner could have discharged its duty to warn of latent defects on the premises by informing the contractor without also telling the contractor's employee, the injured welder. Long Leaf Indus., Inc. v. Mitchell, 252 Ga. App. 343, 556 S.E.2d 242 (2001).

Contractor with knowledge of potential hazard.

Summary judgment for an owner was affirmed as an injured party's knowledge that the outside steps were slippery when wet was at least equal to that of the owner as she had advised the owner's supervisory personnel that the steps were slippery when wet; as the injured party was not carrying equipment when the fall occurred, the need to carry equipment could not have precluded the injured party from taking a dry, inside stairway. Gillis v. Foodonics Int'l, Inc., 273 Ga. App. 759, 615 S.E.2d 854 (2005).

Owner not liable to employees of independent contractor.

Worker's claim against a tire manufacturing plant, alleging a violation of O.C.G.A. § 51-3-1 due to a forklift having an emergency brake that did not work, thereby allowing the forklift to jump back while holding up a transformer, resulting in the worker's arm being crushed by the fallen transformer, failed; the independent contractor was doing work for the worker's own employer, the worker showed no evidence that the tire plant had actual or constructive knowledge of a defect in the forklift, and the forklift was not a part of the premises. Cooper Tire & Rubber Co. v. Merritt, 271 Ga. App. 16, 608 S.E.2d 714 (2004).

Employees of a subcontractor who were electrocuted while working on a construction project had not shown that the owner of the project had the necessary control to be liable under O.C.G.A. § 51-3-1. It was not enough that the owner had the right to visit the site, to ensure that the work conformed to the contract drawings and specifications, and to stop work on the project; there had to be such a retention of a right of supervision so that a contractor was not entirely free to do the work in its own way. Dalton v. 933 Peachtree, L.P., 291 Ga. App. 123, 661 S.E.2d 156 (2008).

Employer under no general duty to contractor's employees. — In a wrongful death action premised on both negligence and negligence per se filed on behalf of a mother's deceased minor son, a premises owner was properly granted summary judgment, as the independent contractor that hired the decedent, and not the premises owner, had sole control over its personnel, and the son's hazardous occupation on the owner's premises for a third party did not in and of itself demonstrate that the owner was in violation of Georgia's child labor laws; thus, the appeals court declined to reach the issue of whether an owner who knew or had reason to know that its independent contractor was employing a minor under the age of 16 to perform a dangerous occupation on the owner's premises was in violation of O.C.G.A. § 39-2-2. Benson-Jones v. Sysco Food Servs. of Atlanta, LLC, 287 Ga. App. 579, 651 S.E.2d 839 (2007).

Duties of premises owner not transferred to maintenance contractor. — Because there was no evidence to challenge the defendant maintenance contractor's status as an independent contractor, the maintenance contractor was not subject to premises liability under O.C.G.A. § 51-3-1 since the duties imposed on the defendant premises owner by § 51-3-1 were not delegable. Ahuja v. Cumberland Mall, LLC, No. 1:10-CV-1038-JEC, 2011 U.S. Dist. LEXIS 109587 (N.D. Ga. Sept. 23, 2011).

Landlord Liability

General liability not controlled by this Code section.

Landlord was not liable for injuries a patron sustained in a restaurant owner's parking lot because although the landlord was responsible by verbal lease for the main structure, while the owner was responsible for maintaining the area where the injury occurred, and the landlord retained limited entry or inspection rights that were unrelated to the cause of the injuries, such limited rights did not evidence such dominion and control of the premises so as to vitiate the landlord's limited liability imposed by O.C.G.A.

§ 44-7-14 and replace it with the liability imposed by O.C.G.A. § 51-3-1. Lake v. APH Enters., LLC, 306 Ga. App. 317, 702 S.E.2d 654 (2010).

Liability for acts of others.

In an action against a landlord and apartment manager arising from the death of a tenant who was killed in a fight with another tenant, even assuming defendants had a duty to intervene the fight, there was no evidence defendants breached this duty because the manager attempted to send the two men home and called police when she believed a fight was imminent. Traicoff v. Withers, 247 Ga. App. 428, 544 S.E.2d 177 (2000).

Tenant established a material fact issue as to whether a landlord should have reasonably foreseen the tenant's rape, based on evidence regarding a stranger's intrusion into another resident's apartment and the later rape of that resident by an attacker, who was the same man who raped the tenant; these incidents were similar, if not identical, to the tenant's rape, and summary judgment for the landlord in the tenant's premises liability claim was error. Mason v. Chateau Cmtys., Inc., 280 Ga. App. 106, 633 S.E.2d 426 (2006).

In an O.C.G.A. § 51-3-1 premises liability case in which a resident of a mobile home park was shot during a robbery of a mobile home where the resident was staying, the park manager and owner moved for summary judgment, arguing that the resident was precluded from recovery as a matter of law because the resident had equal or superior knowledge of the risk posed by criminal activity at the mobile home park and failed to exercise ordinary care for the resident's own safety. The owner and the manager conceded for purposes of their motion that they were aware of similar crimes that occurred at the park prior to the robbery at issue; irrespective of whether the resident had equal or superior knowledge of the risk of third-party criminal attacks at the park, a question of material fact existed as to whether the resident failed to exercise ordinary care for the resident's own safety. Vilchez v. ARC Cmtys. 17, LLC, No. 1;08-CV-03145-JTC, 2010 U.S. Dist. LEXIS 36417 (N.D. Ga. Feb. 22, 2010).

Landowner can relinquish control, etc.

Trial court properly granted summary judgment to warehouse owner on invitee's claim for damages after the invitee fell, during a party hosted by the tenant, from a skateboard ramp that the tenant installed and was injured as the warehouse owner's retention of the right to inspect the leased premises did not evidence such dominion and control of the premises so as to vitiate the warehouse owner's limited liability under O.C.G.A. § 44-7-14 and replace it with liability imposed by O.C.G.A. § 51-3-1, which imposed liability for those having a duty to exercise ordinary care in keeping premises safe. Ray v. Smith, 259 Ga. App. 749, 577 S.E.2d 807 (2003).

Liability of landlord to tenant for known dangerous condition.

When a person appearing to park in a space at an apartment complex suddenly jumped the curb, crossed a sidewalk, and fatally struck a child, the complex's landlord was not liable to the child's parents for not installing "bumper stops" in the complex's parking lot because such devices were not required by any state, federal or local law or ordinance, and a highway traffic safety manual the parents' expert relied on in opining that such devices were required had limited application to parking lots and indicated they had a limited ability to shield pedestrians from vehicles. Sotomayor v. TAMA I, LLC, 274 Ga. App. 323, 617 S.E.2d 606 (2005).

When a person appearing to park in a space at an apartment complex suddenly jumped the curb, crossed a sidewalk, and fatally struck a child, the complex's landlord was not liable to the child's parents for not installing "bumper stops" in the complex's parking lot, even though it had installed them around its leasing office, because it was not shown they were installed to protect pedestrians, and there was no evidence that anyone had driven a car into the wall of one of the buildings at the complex, as occurred here, providing the landlord with notice of the possibility of such an event. Sotomayor v. TAMA I, LLC, 274 Ga. App. 323, 617 S.E.2d 606 (2005).

When a person appearing to park in a

space at an apartment complex suddenly jumped the curb, crossed a sidewalk, and fatally struck a child, the complex's landlord was not liable to the child's parents because it was not reasonably foreseeable that such an event would occur. Sotomayor v. TAMA I, LLC, 274 Ga. App. 323, 617 S.E.2d 606 (2005).

Evidence of knowledge of condition.

Because a landlord knew that a v-notch in a curb was dangerous when covered with straw and knew that the tenants and their invitees regularly and improperly crossed the yard near the curb, the landlord was liable for an invitee's injuries under O.C.G.A. § 51-3-1 when the invitee fell in the v-notch. Brad Bradford Realty, Inc. v. Callaway, 276 Ga. App. 648, 624 S.E.2d 179 (2005).

Landlord not liable. — Trial court erred in denying an apartment building owner's motion for summary judgment on an invitee's premises liability claim arising out of the invitee's slipping and falling in a puddle of water in the building's laundry room; the invitee offered no evidence that the owner had actual knowledge of the hazard, and could not show constructive knowledge given that the owner inspected the laundry room every two hours and there was no evidence of any prior slip and fall. Patrick v. Macon Hous. Auth., 250 Ga. App. 806, 552 S.E.2d 455 (2001).

Summary judgment was properly entered for a landlord and a property manager (appellees) in a negligence suit filed by an injured party as appellees complied with state law as to the installation of smoke detectors contained in O.C.G.A. § 25-2-40(a)(2), and as evidence of any failure to maintain the detectors was inadmissible under O.C.G.A. § 25-2-40(g); as O.C.G.A. § 25-2-40(a)(2) was more specific, it governed over any conflicting statutory or common law duty of care, such as those contained in O.C.G.A. §§ 44-7-13 and 51-3-1, and as O.C.G.A. § 25-2-40(g) was enacted more recently than the older statutes, it controlled. Hill v. Tschannen, 264 Ga. App. 288, 590 S.E.2d 133 (2003).

In a wrongful death suit, because the record was devoid of any evidence that the landlords knew that a tenant, a nephew, had left a gun accessible and loaded on the day a visiting youth was shot, or any other occasion, the trial court erred in denying summary judgment for the landlords; since the landlords knew or should have known that the nephew would have friends occasionally come to visit at the leased premises, the landlords, as possessors of the land, would have been subject to liability for the youth's fatal injury by the loaded shotgun if, but only if, the landlords knew or had reason to know of the hazard in the nephew's loft room and then failed to exercise reasonable care to make the condition safe or to warn visitors, which such superior knowledge of the hazard on the part of the landlords was not shown. McCullough v. Reyes, 287 Ga. App. 483, 651 S.E.2d 810 (2007), cert. denied, 2008 Ga. LEXIS 178 (Ga. 2008).

In a social guest's suit for personal injuries brought against the tenants of certain real property as well as the property owner and the owner's property management company, the trial court properly granted summary judgment to the property owner as there was no evidence that the property owner had actual or constructive knowledge of any problem with the condition of or construction of the deck that fell while the guest was standing upon the deck. Silman v. Assocs. Bellemeade, 294 Ga. App. 764, 669 S.E.2d 663 (2008), aff'd, 286 Ga. 27, 685 S.E.2d 277 (2009).

Trial court erred by denying a building owner's motion for summary judgment under O.C.G.A. § 51-3-1 in an employee's action to recover damages for injuries the employee sustained when the door to a handicap bathroom stall the employee used at work fell off of the door's hinges because the owner had no actual knowledge of any problem with bathroom stall door hinges; the owner conducted reasonable inspections of the property as a matter of law and had never received a report of any problems with any bathroom door hinges before the employee's injury, and there was no evidence that an inspection of the hinge would have revealed any defect. Watts & Colwell Builders, Inc. v. Martin, 313 Ga. App. 1, 720 S.E.2d 329 (2011).

Dog bite.

Trial court did not err in granting a dog owner summary judgment in a roommate's action under the vicious animal statute, O.C.G.A. § 51-2-7, and the premises liability statute, O.C.G.A. § 51-3-1, to recover damages for injuries the roommate sustained when the owner's dog attacked the roommate inside the owner's townhouse because the roommate had knowledge of the dog's vicious propensity equal to that of the owner's; the roommate's own testimony was that the roommate was aware of the dog's previous unprovoked attack and was nervous when around the dog, presumably because the roommate was afraid that the dog could attack again. Stolte v. Hammack, 311 Ga. App. 710, 716 S.E.2d 796 (2011).

Owner must have superior knowledge in dog bite cases. — In a typical dog bite case, regardless of whether the cause of action is based on the premises liability statute of O.C.G.A. § 51-3-1, or the dangerous animal liability statute of O.C.G.A. § 51-2-7, a plaintiff must produce evidence of the vicious propensity of the dog in order to show that the owner of the premises had superior knowledge of the danger. Custer v. Coward, 293 Ga. App. 316, 667 S.E.2d 135 (2008).

Master's Liability to Servant

Company's responsibility for domestic dispute occurring on premises. — A company was not liable to a decedent's estate or the decedent's aunt for injuries inflicted on them by the decedent's estranged husband after the women fled their home seeking safety at the company's premises; the attack was not reasonably foreseeable by the company, and the decedent and her aunt had knowledge equal to or superior to that of the company that the husband had threatened to kill the decedent on the day of the attack and that the husband had a violent history and knew where the decedent worked. Cook v. Micro Craft, Inc., 262 Ga. App. 434, 585 S.E.2d 628 (2003).

Public Accommodation Facilities

Duty of restaurant proprietor is to exercise ordinary care to keep premises safe.

Evidence that a restaurant parking lot had been in disrepair for many years authorized the finding that defendant failed in its duty to carry out periodic inspections and to take reasonable steps to protect invitees from those dangers foreseeable from the uneven parking lot. Jackson v. Waffle House, Inc., 245 Ga. App. 371, 537 S.E.2d 188 (2000).

Use of warning devices that themselves pose hazards. — Merchant's selection and use of devices, such as "Wet Floor" signs, designed to warn patrons of one hazard that have the inherent potential to expose them to a different one does not relieve the merchant of the duty to have the premises in a reasonably safe condition and not to expose the invitees to unreasonable risk. Am. Multi-Cinema, Inc. v. Brown, 285 Ga. 442, 679 S.E.2d 25 (2009).

Restaurant owner was not liable, etc.

Even if a restaurant owner violated a duty to an invitee under O.C.G.A. § 51-3-1 to keep the premises safe, handcuffing the invitee too tightly when the invitee was arrested following an altercation at the restaurant was an intervening act by a police officer which was not foreseeable to the owner, was not triggered by the original negligence, and was sufficient by itself to cause the injury. Kline v. KDB, Inc., 295 Ga. App. 789, 673 S.E.2d 516 (2009).

Motels.

Summary judgment under O.C.G.A. § 9-11-56 was properly granted to a motel company, dismissing a guest's suit seeking to recover for injuries sustained in a slip and fall on the shower floor in the company's motel, because the guest failed to demonstrate that the shower floor presented a hazard, and even assuming that the guest had shown the existence of a hazard, the guest failed to show that the company possessed superior knowledge of the potential harm under O.C.G.A. § 51-3-1. Bryant v. DIVYA, Inc., 278 Ga. App. 101, 628 S.E.2d 163 (2006).

Summary judgment for a motel's owner was affirmed as although a guest allegedly bitten by a poisonous spider submit-

ted an expert's affidavit that a pest control company breached its standard of care and affidavits that there were spider incidents at the owner's other properties, it was undisputed that the owner had no knowledge that there were venomous spiders in its rooms at the motel. Dew v. Motel Props., Inc., 282 Ga. App. 368, 638 S.E.2d 753 (2006), cert. denied, 2007 Ga. LEXIS 205 (Ga. 2007).

Court of appeals did not err in affirming an order granting a motel summary judgment in a wife's a wrongful death action, alleging that the failure of the motel's personnel to heed her concern about the guest amounted to a breach of duty to render aid to a guest because the motel had no duty to comply with the wife's requests to attempt a rescue of the guest from his medical peril; the alleged negligence in the wife's suit could not be credibly cast as a condition of the premises or akin to a premises hazard like a smoke-filled building because any risk or problem stemming from a medical condition unrelated to and not caused by the guest's stay at the facility was not internal to the premises but rather internal to the guest. Rasnick v. Krishna Hospitality, Inc., 289 Ga. 565, 713 S.E.2d 835 (2011).

Hotel not liable for injuries suffered during fight. — Hotel was not liable to a person injured in a fight in the hotel because the party had equal or superior knowledge of the threat of harm posed by a co-worker based on an earlier altercation outside of the front entrance of the hotel, the fact that the party saw the co-worker return to the hotel after hotel security broke up their fight, the fact that the party was aware that the co-worker wanted to continue fighting, and the fact that the party made a conscious decision to return to the hotel without attempting to contact hotel security. Snellgrove v. Hyatt Corp., 277 Ga. App. 119, 625 S.E.2d 517 (2006).

Theater. — Injured party failed to show that the theater had knowledge of a dangerous condition and that the injured party did not; the injured party was aware of the amount of light in the theater as the injured party had already walked upstairs to get to the seat, walked down several more stairs before falling, and if the injured party thought it was too dark to walk down the stairs, it was incumbent upon the injured party to inquire about alternatives. Lake v. Atlanta Landmarks, Inc., 257 Ga. App. 195, 570 S.E.2d 638 (2002).

Duty of amusement park. — In a premises liability suit brought by an amusement park customer who claimed that mildew underneath a mat caused the customer to slip, it could not be said that the park lacked constructive knowledge of the hazard; there were issues of fact as to whether the park had inspected the mat on the date of the incident and as to whether an alleged inspection had been adequate. Valentin v. Six Flags Over Ga., L.P., 286 Ga. App. 508, 649 S.E.2d 809 (2007).

Spectator Events and Facilities

Owner must know of danger for liability to attach.

Trial court properly granted summary judgment to the facility operator because an attendee, after attending a concert at the facility, slipped and fell on gum balls that had fallen from sweet gum trees; the operator was not liable under O.C.G.A. § 51-3-1, as the accumulation of gum balls from sweet gum trees was natural, and there was no evidence that it had become an obvious hazard. Leibel v. Sandy Springs Historic Cmty. Found., Inc., 281 Ga. App. 390, 636 S.E.2d 27 (2006).

Assumption of risk by patron.

Plaintiffs' claim that a church induced them to walk on boards on an infield was rejected as the plaintiffs' photographs showed that although the track was fenced off from the bleachers, with the boards covering the only opening in the fencing, people attending the event had the options of either stepping off the boards as soon as they cleared the fencing or stepping over them altogether; the plaintiffs were under no compulsion to remain on the boards as they moved towards the infield, nor was the church responsible for the injured party's distraction as the party walked across the boards since the party knew of their dangerous condition before becoming distracted. Haggerty v. Hebron Baptist Church, Inc., 273 Ga. App. 371, 615 S.E.2d 148 (2005).

Injured party knew of dangerous condition. — Summary judgment for a church was affirmed as the injured party knew before a fall that the boards "were not anchored down," "were not flush with each other," and "moved" when a vehicle drove over them; the plaintiffs could not show that they lacked knowledge of the boards' dangerous condition and, therefore, could not prove that the church's negligence caused the fall. Haggerty v. Hebron Baptist Church, Inc., 273 Ga. App. 371, 615 S.E.2d 148 (2005).

Art center had no duty to provide on-site ambulance or automatic external defibrillator device. — Trial court did not err in entering summary judgment in favor of an arts center in a widow's wrongful death action because the center had no duty as a matter of law to provide an on-site ambulance or an automatic external defibrillator device at the concert the widow and her husband attended; the widow did not adduce any evidence that the traffic on the night her husband suffered a cardiac arrest was hazardous or that the ambulance that answered the 911 call was delayed by the concert crowd or traffic. Boller v. Robert W. Woodruff Arts Ctr., Inc., 311 Ga. App. 693, 716 S.E.2d 713 (2011).

Miscellaneous

Employee of express company.

Where a fast-food restaurant cashier struck a customer, then got into a fight with the customer, customer's premises liability claim against the restaurant failed; restaurant did not have knowledge that the cashier would engage in such conduct because the cashier had indicated in a job application that the cashier had not been convicted of a felony, and during three months that the cashier worked at the restaurant prior to the altercation, there was no evidence that the cashier ever argued with, much less struck, customers. Dowdell v. Krystal Co., 291 Ga. App. 469, 662 S.E.2d 150 (2008), cert. denied, 2008 Ga. LEXIS 787 (Ga. 2008).

Grocery store.

Owner of a grocery store was erroneously granted summary judgment in a negligence suit by a store patron who slipped on a grape and fell, as the testimony regarding the manager's unobstructed view of the area where the fall occurred, the manager's admission that the manager could have seen the grape, and the evidence that the manager and two other employees were in the immediate vicinity and could easily have removed the hazard had they seen it, all revealed that there was a genuine issue of material fact as to whether the store owner had constructive knowledge of the dangerous condition. Dix v. Kroger Co., 257 Ga. App. 19, 570 S.E.2d 89 (2002).

"Final approach" to employer's property. — At the very least, the last 10 to 15 yards of a road leading to a company's property, which included a railroad crossing where a car was struck by a train, constituted a final approach to that property; the evidence indicated that the company treated the road as an extension of its own property or as the functional equivalent of a private driveway. Combs v. Atlanta Auto Auction, Inc., 287 Ga. App. 9, 650 S.E.2d 709 (2007), cert. denied, 2008 Ga. LEXIS 156 (Ga. 2008).

Churches. — In a wrongful death action against a church as a premises owner, because the decedent's husband, as administrator of the estate, failed to raise a material fact question of the church's liability for allowing its parishioners to park on the side of the roadway, and thus, obstruct the decedent's view of the adjacent intersection, causing the decedent to collide with an oncoming northbound vehicle, the church was properly granted summary judgment. Gay v. Redland Baptist Church, 288 Ga. App. 28, 653 S.E.2d 779 (2007).

Private property owners could forbid the possession of a weapon on the owners' premises as property law, tort law, and criminal law, such as that later codified in O.C.G.A. §§ 16-7-21(b)(3), 51-3-1, 51-3-2, 51-9-1, provided the canvas on which the Second Amendment was drafted and illustrated that the basis of the Second Amendment did not include protection for a right to carry a firearm in a place of worship against the church owner's wishes. GeorgiaCarry.Org, Inc v. Georgia, 687 F.3d 1244 (11th Cir. 2012).

Parking lots.

Absent evidence that the owner reason-

ably inspected the parking lot for defects and that the ice formation was a new defect of which the owner had no notice or sufficient time to correct, it could not be said as a matter of law that it complied with its duty to business invitees to keep the premises safe. Kauffman v. Eastern Food & Gas, Inc., 246 Ga. App. 103, 539 S.E.2d 599 (2000).

City had actual notice of design defect in landfill for summary judgment purposes where an injured party's expert averred: (1) that there was an elevation difference of between eight and 10 feet between the working surface and the grade elevation near the bottom of a dumpster; (2) that cover plates installed over the opening did not continue along the full length of the dumpster and left a corner unprotected; and (3) that there were no visual markings to warn of the fall hazard. Barton v. City of Rome, 271 Ga. App. 858, 610 S.E.2d 566 (2005).

Naturally occurring ice.

In a suit where the plaintiff alleged that the plaintiff had slipped on ice in a parking lot, the trial court properly refused to give the plaintiff's proposed jury instruction as to an accumulation of naturally occurring ice; both the charge requested and the charge given covered a proprietor's duty to exercise ordinary care, including the duty to inspect the premises for dangerous conditions. Fowler Props. v. Dowland, 282 Ga. 76, 646 S.E.2d 197 (2007).

Truck stops. — In a slip and fall case based on an injured party's fall in a truck stop's shower, the truck stop owner was not entitled to summary judgment because its admitted lack of a regular inspection procedure created a genuine issue of material fact as to whether it had constructive knowledge of the condition which caused the injured party to fall, and it was not shown that the injured party failed to exercise care for the party's own safety, as the party removed two used bars of soap from the shower floor. Pylant v. Samuels Inc., 262 Ga. App. 358, 585 S.E.2d 696 (2003).

Billboard repair. — Being lifted by a forklift holding a makeshift platform not fixed to the forks entailed an open and obvious risk that the platform could move up, down, or sideways, causing the men on the platform to lose their balance without having a means to recover; because after two nights using the forklift and platform in this condition, an injured person was aware of and appreciated both actually and subjectively the risk of injury by falling, and freely and voluntarily chose to be lifted this way to work on a billboard, the trial court correctly granted summary judgment on the injured person's suit based on the theories of O.C.G.A. §§ 51-1-2 and 51-3-1. Sones v. Real Estate Dev. Group, Inc., 270 Ga. App. 507, 606 S.E.2d 687 (2004).

Third-party criminal acts. — Landlord was not liable for injuries to a tenant who was shot while sitting on a bench outside the apartment building because the tenant was aware that it was dangerous to sit on the bench at night and that prior shootings had occurred on the block and, thus, his knowledge of the danger was at least equal to that of the landlord. Johnson v. Atlanta Hous. Auth., 243 Ga. App. 157, 532 S.E.2d 701 (2000).

Theater, as a premises owner, did not breach its duty to the injured party, as an invitee, to exercise ordinary care in keeping its premises and approaches safe, where the injured party's injuries were not caused by any nonfeasance or malfeasance on the theater's part, but upon the injured party's voluntary act of confronting a loud patron, appreciating the danger in doing so. Fernandez v. Ga. Theatre Co. II, 261 Ga. App. 892, 583 S.E.2d 926 (2003).

When a couple brought suit against a grocery store and the owner of a shopping center after one spouse was assaulted in the center's parking lot, summary judgment was properly granted for the store and the owner. The couple had failed to bring forward any evidence of a substantially similar crime that took place before the attack and thus had not shown that the attack was reasonably foreseeable. Drayton v. Kroger Co., 297 Ga. App. 484, 677 S.E.2d 316 (2009).

In a dog bite case, etc.

whether the cause of action is based on the premises liability statute or the dangerous animal liability statute, plaintiffs were required to produce evidence of the

vicious propensity of the dog in order to show the dangerous condition of which the premises owner had superior knowledge. Wade v. American Nat'l Ins. Co., 246 Ga. App. 458, 540 S.E.2d 671 (2000).

Trial court erred in denying an animal care clinic's motion for summary judgment in a guest's action to recover damages for injuries the guest sustained when a dog bit the guest because the guest failed to produce any evidence of the dog's vicious or dangerous propensity pursuant to O.C.G.A. §§ 51-2-7 and 51-3-1; the dog had never bitten or harmed anyone before the incident with the guest. Abundant Animal Care, LLC v. Gray, 316 Ga. App. 193, 728 S.E.2d 822 (2012).

Trial court did not err in granting a dog owner summary judgment in a nurse's action under the premises liability statute, O.C.G.A. § 51-3-1, to recover for injuries the nurse sustained when the dog bit the nurse while the nurse was at the owner's home because the nurse pointed to no evidence giving rise to a genuine issue of material fact on the dog's vicious propensity and the owner's knowledge thereof. Stennette v. Miller, 316 Ga. App. 425, 729 S.E.2d 559 (2012).

Prerequisite to recovery. — In a wrongful death action based on the death of an infant caused by a dog, the dog owner was entitled to summary judgment on the parents' claim for premises liability under O.C.G.A. § 51-3-1 since the parents failed to present evidence that the animal demonstrated dangerous propensities. Harper v. Robinson, 263 Ga. App. 727, 589 S.E.2d 295 (2003).

Condominium association's duty to its members only pursuant to O.C.G.A. § 51-3-1 with regard to the common elements of a condominium property may be circumscribed by the terms of the condominium instruments or contract, and a court must look to the terms of the contract, as well as O.C.G.A. § 44-3-70 et seq., in order to determine an association's duties, and in that regard, it is the paramount public policy of Georgia that courts will not lightly interfere with the freedom of parties to contract as a contracting party may waive or renounce that which the law has established in his or her favor, when it does not thereby injure others or affect the public interest. Bradford Square Condo. Ass'n v. Miller, 258 Ga. App. 240, 573 S.E.2d 405 (2002).

In a personal injury action against a community owners' association arising out of an injury to an owner in a common area of the community, a trial court did not err in construing a restrictive covenant to relieve the association of its duty to inspect the common area and maintain it in a safe condition under O.C.G.A. § 51-3-1; by providing that owners would use common areas at their own risk and peril, the covenant indicated an intention not merely to create a duty parallel to that ordinarily born by a landowner, but to shift the duty entirely to owners using the common area. Hayes v. Lakeside Vill. Owners Ass'n, 282 Ga. App. 866, 640 S.E.2d 373 (2006).

Patient visiting doctor's office. — Summary judgment was properly granted against an injured party, who testified to previously visiting a doctor's office and successfully crossing over protruding tree roots with little or no problem since the patient failed to prove that the doctor had more than an equal knowledge of the hazardous condition; thus, the doctor had no duty to warn. Pye v. Reagin, 262 Ga. App. 490, 586 S.E.2d 5 (2003).

Night depository at bank. — In a wrongful death suit based on the murder of a bank customer who was trying to use a night depository, summary judgment was properly entered for the bank. Although a previous late-night attempt to break into the bank's automated teller machine was at least marginally sufficient to put the bank on notice of the possibility of a criminal attack upon a bank customer at night in the same place, the decedent had knowledge that was equal to the bank's of the danger that was presented by the night depository's location in a secluded, poorly lit area. Norby v. Heritage Bank, 284 Ga. App. 360, 644 S.E.2d 185 (2007), cert. denied, 2007 Ga. LEXIS 553 (Ga. 2007).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Liability of an Owner or Operator of a Self-Service Filling Station for Injury or Death of a Business Invitee on the Premises, 46 POF3d 161.

ALR. — Comparative negligence, contributory negligence, and assumption of risk in action against owner of store, office, or similar place of business by invitee falling on tracked-in water or snow, 83 ALR5th 589.

Liability of owner of store, office, or similar place of business to invitee falling on tracked-in water or snow, 123 ALR5th 1.

Liability of owner or operator of store or similar place of business for injury resulting from defective or dangerous shelves, displays, racks, counters, or the like, 1 ALR6th 297.

51-3-2. Duty of owner of premises to licensee.

Law reviews. — For annual survey of tort law, see 57 Mercer L. Rev. 363 (2005). For survey article on tort law, see 60 Mercer L. Rev. 375 (2008).

JUDICIAL DECISIONS

Analysis

General Consideration

Visit disconnected from business purpose confers licensee status.

Summary judgment should have been granted in favor of a store and its employees on a tortious misconduct claim in a parent's action arising out of the employees' claim that the parent's child stole from the store because the child did not meet the legal definition of an invitee under O.C.G.A. § 51-3-1; the child had to be regarded as a licensee under O.C.G.A. § 51-3-2(a)(3) because the child entered the store only to use its bathroom and had no intention of shopping there. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Social guest in defendant's private home is mere licensee.

In a slip and fall action between a daughter and the daughter's mother, because the evidence showed that the daughter was a mere social guest or licensee in the mother's home at the time of the daughter's injury, and not an invitee, present only in the home for the daughter's convenience, and the mother did not act with any intent to harm the daughter, the mother was properly granted summary judgment on the issue of liability for the daughter's personal injuries resulting from a slip and fall. Behforouz v. Vakil, 281 Ga. App. 603, 636 S.E.2d 674 (2006).

No evidence of willfulness. — Owners of property containing a tree were not liable to an individual after the individual's eardrum was punctured by a branch from the tree overhanging a sidewalk as there was no evidence of willfulness; it was clear that the tree and its overhanging branches were visible to the individual and were in no way a pitfall, mantrap, or hidden peril. Perkins v. Kranz, 316 Ga. App. 171, 728 S.E.2d 804 (2012).

Homeowner's statements regarding fault did not prove willful or wanton conduct. — Homeowner's statements that the homeowner felt like the homeowner was at fault for an injured party's fall off of a deck were merely expressions of benevolence and were legally immaterial; the statements did not

create questions of fact that precluded summary judgment as without willful or wanton conduct, the homeowner was not liable for the injured party's injuries. Trulove v. Jones, 271 Ga. App. 681, 610 S.E.2d 649 (2005).

Homeowner owed no duty for obvious danger of broom handle. — In a licensee's personal injury action, the trial court properly found that a homeowner was entitled to summary judgment as a matter of law, as the homeowner owed no duty to the licensee to warn of the obviousness of a broom handle, tools on the floor, or the couch corner, which the licensee alleged caused a fall, as such were plainly visible and not hidden perils. Ellis v. Hadnott, 282 Ga. App. 584, 639 S.E.2d 559 (2006).

Governmental liability to people using state land. — The Georgia Department of Natural Resources' liability to people who use state land is similar to that which a possessor of land owes a licensee under O.C.G.A. § 51-3-2. Lee v. Dep't of Natural Res. of Ga., 263 Ga. App. 491, 588 S.E.2d 260 (2003).

Cited in Barnes v. St. Stephen's Missionary Baptist Church, 260 Ga. App. 765, 580 S.E.2d 587 (2003); McCullough v. Reyes, 287 Ga. App. 483, 651 S.E.2d 810 (2007).

Duty Owed to Children

1. In General

Child social guest licensee rather than invitee.

Trial court erred in granting summary judgment to the property owners in a negligence claim because genuine issues of material fact remained as to the whether the property owners violated applicable building codes in the construction of their deck, whether they exercised ordinary care in preventing injury to their guests from a defect in the deck or showed such indifference to consequences as to justify a finding of wantonness, and whether their injured grandchild, a licensee, had equal knowledge of the hazard and failed to exercise ordinary care for the grandchild's personal safety. Hicks v. Walker, 262 Ga. App. 216, 585 S.E.2d 83 (2003).

Child entering store to use restroom deemed licensee, not invitee. — In a parent's suit as a next friend to the parent's daughter, the trial court erred in denying summary judgment to a retailer and its employees on the parent's claim of tortious misconduct, as no evidence was presented that the child victim was the retailer's business invitee, but was merely a licensee under both O.C.G.A. §§ 51-3-1 and 51-3-2, as the child merely entered the business with the sole intent to use the restroom; however, summary judgment was properly denied as to the invasion of privacy, intentional infliction of emotional distress, false imprisonment, false arrest and damages claims filed by the parent against the defendants. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Child injured in shed. — Defendant homeowners were properly granted summary judgment in a premise liability action arising from an injury sustained by a child while he and the homeowners' children were playing in a shed, and a pulley fell from an I-beam and broke the child's leg since the child was a licensee, and the homeowners did not know that the child was in the shed or that he would play with a pulley and chain in the shed. Bartlett v. Maffett, 247 Ga. App. 749, 545 S.E.2d 329 (2001).

Applicability to Specific Cases

Failure to follow building code. — Trial court did not err in granting co-owners' motions for summary judgment in a wrongful death action filed by a decedent's mother and sister because the co-owners did not have superior knowledge of the danger posed by the retaining wall from which the decedent fell and the decedent had actual knowledge of the hazard; the fact that an owner was negligent per se in failing to comply with a building code does not impose liability if the owner lacks superior knowledge of the hazard. Barnes v. Morgantown Baptist Ass'n, 306 Ga. App. 755, 703 S.E.2d 359 (2010).

Defective condition of residential premises.

Because the plaintiff, a licensee, had

successfully traversed frayed carpet at the defendant homeowners' porch door at least 20 times and stated that on one of those visits, she stumbled while exiting through the same doorway and that she believed that the carpet had also caused that stumble, her testimony made it clear that she knew or should have known of the risks associated with the carpet at the threshold and the grant of summary judgment by the trial court in favor of the defendants was, therefore, proper. Odum v. Gibson, 245 Ga. App. 394, 537 S.E.2d 801 (2000).

Defective brick wall. — Denial of an owner's summary judgment motion was reversed as the owner's duty to a licensee under O.C.G.A. § 51-3-2(b) arose after the owner became aware of, or should have anticipated the presence of, the licensee near the peril and the owner had no knowledge that the licensee, who was invited into the owner's home by the owner's friends, was on the owner's property and should not have anticipated the licensee's presence near a defective brick wall; the licensee's claim that the defective wall was a mantrap or pitfall was rejected as that doctrine rested upon the theory that the owner was expecting a trespasser or licensee and had prepared the premises to do the trespasser injury. Buce v. Fudge, 281 Ga. App. 221, 635 S.E.2d 788 (2006), cert. denied, 2007 Ga. LEXIS 107 (Ga. 2007).

Developer not liable for drowning in lake. — When a decedent entered a lake to rescue the decedent's minor son, the decedent became, at most, a licensee; since an owner or occupier of property owed no duty to trespassers or licensees other than to refrain from willfully or wantonly injuring them, and since there was no evidence that a developer acted in a willful or wanton manner, summary judgment for the developer in a wrongful death case arising from the decedent's drowning was proper. Brazier v. Phoenix Group Mgmt., 280 Ga. App. 67, 633 S.E.2d 354 (2006), cert. denied, 2007 Ga. LEXIS 113 (2007).

Homeowner not liable for party's injuries from fall off of deck. — Homeowner was not liable for an injured party's injuries because the injured party was injured when the homeowner rolled into a pool at the prodding of a boy and the injured party jumped out of the way; the injured party had an equal knowledge of the obvious lack of railings on the deck. Trulove v. Jones, 271 Ga. App. 681, 610 S.E.2d 649 (2005).

An owner was not liable to a guest, who was a licensee, for a failure to warn the guest of the low railing on a balcony as the condition of the balcony constituted a static condition, not a hidden peril, pitfall, or mantrap; there was no evidence that the owner wilfully or wantonly injured the guest or that the owner knowingly exposed the guest to a dangerous activity, hidden peril, pitfall, or mantrap under O.C.G.A. § 51-3-2(b). Jordan v. Bennett, 312 Ga. App. 838, 720 S.E.2d 301 (2011).

Accidental shooting by third party. — Premises owner and its operator were properly granted summary judgment in an action filed against them by a decedent's administrator, as the decedent, who was granted permission to hunt on the property without a permit, was not shown to be anything other than a licensee, no breach of any duty owed to the decedent as a licensee was presented, and an intervening illegal act by a third party was the proximate cause of the decedent's death; moreover, because the evidence showed that there had never been an accidental shooting of one hunter by another on the premises, no basis existed for holding that the owners or operator should have foreseen that a third party would come onto the property and illegally shoot at a target which the third party could not identify. Hadden v. ARE Props., LLC, 280 Ga. App. 314, 633 S.E.2d 667 (2006).

Visitor without definite appointment deemed licensee.

Injured party was a licensee where the injured party entered into the lobby of a radio station just to be with the injured party's child, who was being interviewed, and had no other business at the station; the station did not obtain a benefit by virtue of the injured party's visit and did not impliedly invite the public at large into its lobby. Howard v. Gram Corp., 268 Ga. App. 466, 602 S.E.2d 241 (2004).

Failure of employer to install signals at railroad crossing. — When the

car in which an employee's children were traveling was struck by a train after the driver dropped off the employee at the employer's facility, the fact that the children were licensees did not prevent the employee from bringing a premises liability claim against the employer for its failure to comply with a zoning ordinance requiring the employer to pay for the installation of traffic signals at the railroad crossing where the accident occurred. Combs v. Atlanta Auto Auction, Inc., 287 Ga. App. 9, 650 S.E.2d 709 (2007), cert. denied, 2008 Ga. LEXIS 156 (Ga. 2008).

Rollerblading accident. — Trial court properly granted summary judgment to homeowners on parent and next friend's negligence suit against them after the parent and next friend's 11-year-old child sat at the top of a rollerblading ramp, slid down it, and fractured the child's wrist in the process, as the child was a social invitee, which made the child a licensee on their property, and, thus, they only owed the child a duty not to willfully or wantonly injure the child; since the record did not show any evidence that they willfully or wantonly injured the child, inasmuch as they were not home at the time and did not even know the child was on their property, the trial court properly granted summary judgment to the homeowners on the parent and next friend's claim that the dangerous condition on their property caused the child's injury. Rice v. Elliott, 256 Ga. App. 87, 567 S.E.2d 721 (2002).

Emergency medical technician. — Given the emergency circumstances with which a property owner was faced, it was unreasonable to expect the owner to have exercised the same degree of care in preparing the owner's home and property for the arrival of the emergency personnel as the owner would have been required to exercise before welcoming an invitee in a non-emergency situation. Accordingly, under the circumstances presented in the case, the emergency medical technician who responded to the scene and was injured on the owner's property was a licensee as a matter of law under O.C.G.A. § 51-3-2(a). Sands v. Lindsey, 314 Ga. App. 160, 723 S.E.2d 471 (2012).

Emergency medical technician (EMT) failed to demonstrate that a jury issue existed as to whether a property owner breached the owner's duty to the EMT as a licensee. The EMT failed to cite to any authority supporting a conclusion that the owner's oversights, occurring when the owner left open the owner's front door but left closed the owner's glass storm door in anticipation of the arrival of the EMT in response to an emergency situation, evidenced a wanton disregard for the EMT's safety, as opposed to mere negligence. Sands v. Lindsey, 314 Ga. App. 160, 723 S.E.2d 471 (2012).

Planting of shrubbery beside a drainage ditch. — Defendant's actions do not evidence the level of intent for willfulness or wantonness required to show the violation of a duty to a licensee. Aldredge v. Symbas, 248 Ga. App. 578, 547 S.E.2d 295 (2001).

Carpet scraps. — Guest of the homeowner was a licensee while visiting the homeowner at his mobile home and thus the homeowner owed guest a duty to not willfully or wantonly injure the guest; accordingly, the trial court erred in granting summary judgment to the homeowner as a trier of fact had to consider whether the homeowner had superior knowledge that carpet scrap was a hazard to the guest. Williams v. Truett, 251 Ga. App. 46, 553 S.E.2d 350 (2001).

Potholes. — Trial court erred in denying summary judgment to both a city and the Department of Transportation, in a slip and fall case filed against them by a pedestrian, as: (1) the pedestrian conceded that the pedestrian was a licensee with equal constructive knowledge of any hazard posed by potholes; (2) the pothole in which the pedestrian fell was not a concealed or camouflaged danger; and (3) no evidence was presented that the pothole was maintained wilfully or wantonly. Ga. DOT v. Strickland, 279 Ga. App. 753, 632 S.E.2d 416 (2006).

Knowledge of gunfire potential. — Property owner was not liable in wrongful death action where the decedent was, at most, a social guest or licensee since the parent failed to show that the property owner had any knowledge about the actual danger of firearms being discharged

on New Year's Eve at or near the owner's property and there was no evidence of substantially similar crimes occurring on the owner's property. Spear v. Calhoun, 261 Ga. App. 835, 584 S.E.2d 71 (2003).

Fallen deck. — In a social guest's suit for personal injuries brought against the tenants of certain real property as well as the property owner and the owner's property management company, the trial court properly granted summary judgment to the property owner as there was no evidence that the property owner had actual or constructive knowledge of any problem with the condition of or construction of the deck that fell while the guest was standing upon the deck. Silman v. Assocs. Bellemeade, 294 Ga. App. 764, 669 S.E.2d 663 (2008), aff'd, 286 Ga. 27, 685 S.E.2d 277 (2009).

Food inspector invitee. — Federal food inspector was an invitee under O.C.G.A. § 51-3-1, not a licensee under O.C.G.A. § 51-3-2, because the inspector was not present at an owner's chicken processing plant merely for the inspector's own pleasure or convenience but rather pursuant to United States Department of Agriculture (USDA) responsibilities; the owner could not have legally conducted business without the presence of USDA inspectors, which indicated that the owner received an advantage from the inspector's presence on the property and, thus, was easy to infer that the owner invited the inspector onto the premises in order to ensure compliance with federal regulations so that the owner could operate the plant. Sanderson Farms, Inc. v. Atkins, 310 Ga. App. 423, 713 S.E.2d 483 (2011).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Negligent Excavation — Cave-In on Worker, 21 POF3d 217.

ARTICLE 2

OWNERS OF PROPERTY USED FOR RECREATIONAL PURPOSES

Law reviews. — For annual survey of administrative law, see 56 Mercer L. Rev. 31 (2004).

JUDICIAL DECISIONS

Constitutionality. — The Recreational Property Act is not unconstitutionally vague as applied to the facts in suits arising out of the bombing in Centennial Olympic Park during the 1996 Olympic Games because it provides fair notice to persons of normal intelligence that a park created to celebrate the spirit of an historic athletic and cultural event and to provide a gathering place for visitors to relax and enjoy themselves constitutes property available to the public for recreational purposes so as to come within the immunity provisions of the Act. Anderson v. Atlanta Comm. for Olympic Games, Inc., 273 Ga. 113, 537 S.E.2d 345 (2000).

The Recreational Property Act did not unconstitutionally violate plaintiffs' due process and equal protection rights in suits arising out of the bombing in Centennial Olympic Park during the 1996 Olympic Games because it reasonably promotes the legitimate governmental purpose of making recreational property more accessible to the public and the classification it draws between those persons injured while on recreational property and those persons injured on other premises is rationally related to this legitimate purpose. Anderson v. Atlanta Comm. for Olympic Games, Inc., 273 Ga. 113, 537 S.E.2d 345 (2000).

The Recreational Property Act does not violate the provision in Ga. Const. Art. III, Sec. V, Par. III, prohibiting the passage of a law which refers to more than one subject matter. Anderson v. Atlanta Comm. for Olympic Games, Inc., 273 Ga. 113, 537 S.E.2d 345 (2000).

Commercial interests mixed with recreational activities. — In situations where commercial interests are mixed with recreational activities, a balancing test to determine whether an activity is "recreational" requires that all social and economic aspects of the activity be examined; relevant considerations on this question include, without limitation, the intrinsic nature of the activity, the type of service or commodity offered to the public, and the activity's purpose and consequence. Anderson v. Atlanta Comm. for Olympic Games, Inc., 273 Ga. 113, 537 S.E.2d 345 (2000).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — School's Failure to Maintain Children's Play Area Properly, 9 POF2d 729.

Defectively Designed or Constructed Swimming Pool, 12 POF2d 545.

Sport Injury — Negligence, 15 POF2d 1.

Playground Accidents — Human Impact Tolerance, 21 POF2d 701.

Dangerous or Defective Amusement Ride, 25 POF2d 613.

Negligent Operation or Public Swimming Pool, 34 POF2d 63.

Negligent Operation of Private Swimming Pool, 38 POF2d 1.

Inadequate Protection of Spectator at Sporting Event, 45 POF2d 407.

Liability for Trampoline Injury, 45 POF2d 469.

Assumption of Risk Defense in Sports or Recreation Injury Cases, 30 POF3d 161.

Liability for Errant Golf Ball Shots, 31 POF3d 87.

Negligent Operation of Gymnasium, Health Club, or Similar Facility, 40 POF3d 111.

Liability of Ski Area Operator for Skiing Accident, 45 POF3d 115.

51-3-20. Purpose of article.

Law reviews. — For annual survey article on local government law, see 52 Mercer L. Rev. 341 (2000). For annual survey of administrative law, see 56 Mercer L. Rev. 31 (2004). For survey article on local government law, see 59 Mercer L. Rev. 285 (2007).

JUDICIAL DECISIONS

"Public" construed.

Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., was not limited to privately held land; a welcome center where a traveler was injured was recreational, and thus the department which owned the welcome center was immune from liability and any connection between brochures offered at the welcome center and the state's eventual "profit" from increased tax revenue was far too tenuous to render the venture commercial. Matheson v. Ga. DOT, 280 Ga. App. 192, 633 S.E.2d 569 (2006).

Fact finder was required to resolve conflicts in evidence which showed that a park where a bomb exploded during the 1996 Olympics had both commercial and recreational aspects before the trial court could determine if an Olympic committee was immune from liability for injuries and death, pursuant to Georgia's Recreational Property Act, O.C.G.A. § 51-3-20 et seq., and the state supreme court ruled that, on remand, the jury could consider evidence of the committee's purpose as demonstrated before, during, and after the bomb exploded. Atlanta Comm. for the Olympic Games, Inc. v. Hawthorne, 278 Ga. 116, 598 S.E.2d 471 (2004).

Conclusion that Recreational Property Act waived sovereign and official immunities was erroneous. — Although finding that official immunity

shielded a county employee from liability for injuries suffered by a child when that child fell from a swing on county property that the employee previously inspected, and that sovereign immunity shielded the county, the trial court nonetheless erred in concluding that the Recreational Property Act, O.C.G.A. § 51-3-20 et seq., waived these immunities, as: (1) implied waivers of governmental immunity were not to be favored; (2) the employee was entitled to official or qualified immunity, which could not be waived; and (3) even assuming a partial waiver of sovereign and official immunity through enactment of the Act, no evidence was presented that the employee acted willfully and the defect complained about by the child's parent was apparent to those using the property. Norton v. Cobb, 284 Ga. App. 303, 643 S.E.2d 803 (2007), cert. denied, 2007 Ga. LEXIS 634 (Ga. 2007).

Plaintiff unable to recover for injuries.

Spouse's action against the Georgia Department of Natural Resources, seeking damages for injuries sustained when the injured spouse tripped on a debris pile that was located near a public restroom on state land, was barred by the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq. Lee v. Dep't of Natural Res. of Ga., 263 Ga. App. 491, 588 S.E.2d 260 (2003).

Trial court did not err in granting summary judgment to a city on allegations of negligence asserted against it by an injured motorcycle driver, as the Recreational Property Act (Act), O.C.G.A. § 51-3-20 et seq., prevented the driver from recovering from the city based on allegations of simple negligence; moreover, the Act clearly applied because it was undisputed that the injuries occurred when the driver collided with the cable fence on the city's recreational property, and the city permitted the general public to use the park and open field where the accident occurred for recreational purposes without charge. Carroll v. City of Carrollton, 280 Ga. App. 172, 633 S.E.2d 591 (2006).

Trial court properly granted summary judgment to the Georgia Department of Natural Resources and a power company in a mother's wrongful death action after the mother's child drowned at a visit to a state park as the Recreational Property Act, O.C.G.A. § 51-3-20 et seq., absolved the entities from any liability since there was no evidence that the drowning resulted from a willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. Ray v. Ga. Dep't of Natural Res., 296 Ga. App. 700, 675 S.E.2d 585 (2009).

Issue should be submitted to jury for balancing test analysis. — Grant of summary judgment in favor of the city in a wrongful-death action brought by the decedent's spouse was improper under the Recreational Property Act (RPA), O.C.G.A. § 51-3-20 et seq., because the trial court was required to submit the issue to the jury to perform the required balancing test, considering the totality of the circumstances. Upon the jury's resolution of the factual issue, the trial court was required to apply the jury's finding and determine as a matter of law whether or not the RPA applied to limit the city's liability in the case. Butler v. Carlisle, 299 Ga. App. 815, 683 S.E.2d 882 (2009), cert. denied, No. S10C0052, 2010 Ga. LEXIS 155 (Ga. 2010).

Cited in Anderson v. Atlanta Comm. for the Olympic Games, Inc., 261 Ga. App. 895, 584 S.E.2d 16 (2003).

51-3-21. Definitions.

JUDICIAL DECISIONS

"Recreational purpose" construed.

A park created to celebrate the spirit of an historic athletic and cultural event and to provide a gathering place for visitors to relax and enjoy themselves constitutes property available to the public for recreational purposes so as to come within the immunity provisions of the Recreational Property Act. Anderson v. Atlanta Comm. for Olympic Games, Inc., 273 Ga. 113, 537 S.E.2d 345 (2000).

Summary judgment was inappropriate

where a fact issue remained as to whether a lot owner's clearing of property subject to an easement interfered with the easement holders' rights to use the land for recreational purposes, such as enjoying the land in its natural uncut state. East Beach Properties, Ltd. v. Taylor, 250 Ga. App. 798, 552 S.E.2d 103 (2001).

Summary judgment was improperly entered in favor of an Olympic Committee, where a genuine issue of material fact existed about whether the operation of the Olympic Park was a commercial or a recreational venture; on remand, the jury was ordered to resolve the question of whether the nature of the Park at the time of the underlying explosion which caused the death or injury of those involved in the litigation was commercial or recreational, and the court was to decide whether the Recreational Property Act, O.C.G.A. § 51-3-20 et seq., applied to the Park and insulated the Committee from liability. Anderson v. Atlanta Comm. for the Olympic Games, Inc., 261 Ga. App. 895, 584 S.E.2d 16 (2003), aff'd, sub nom. Atlanta Comm. for the Olympic Games, Inc. v. Hawthorne, 278 Ga. 116, 598 S.E.2d 471 (2004).

Trial court did not err in granting summary judgment to a city on allegations of negligence asserted against it by an injured motorcycle driver, as the Recreational Property Act (Act), O.C.G.A. § 51-3-20 et seq., prevented the driver from recovering from the city based on allegations of simple negligence; moreover, the Act clearly applied because it was undisputed that the injuries occurred when the driver collided with the cable fence on the city's recreational property, and the city permitted the general public to use the park and open field where the accident occurred for recreational purposes without charge. Carroll v. City of Carrollton, 280 Ga. App. 172, 633 S.E.2d 591 (2006).

Hunting is among the many recreational purposes recognized by the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq. Lee v. Dep't of Natural Res. of Ga., 263 Ga. App. 491, 588 S.E.2d 260 (2003).

Cemetery maintenance company. — Whether the Recreational Property Act, O.C.G.A. § 51-3-20 et seq., applied to a cemetery maintenance company was a question for the jury; liability could be imposed based upon theories that the maintenance company acted as the cemetery owner's agent. Martin v. Dempsey Funeral Servs. of Ga., Inc., 319 Ga. App. 343, 735 S.E.2d 59 (2012).

Cited in Cooley v. City of Carrollton, 249 Ga. App. 387, 547 S.E.2d 689 (2001).

51-3-22. Duty of owner of land to those using same for recreation generally.

JUDICIAL DECISIONS

Public use not proven. — Trial court erred in granting summary judgment for a school board as to an injured party's personal injury claim based on the Georgia Recreational Purposes Act, specifically O.C.G.A. §§ 51-3-22 and 51-3-23, as the school board presented no evidence that the playground was open to the public and the injured party presented evidence that the playground: (1) was fenced-in; (2) was only for the use of children enrolled in the school; and (3) was not open to any segment of the general public. Hart v. Appling County Sch. Bd., 266 Ga. App. 300, 597 S.E.2d 462 (2004).

Plaintiff unable to recover for injuries.

Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., was not limited to privately held land; a welcome center where a traveler was injured was recreational, and thus the department which owned the welcome center was immune from liability and any connection between brochures offered at the welcome center and the state's eventual "profit" from increased tax revenue was far too tenuous to render the venture commercial. Matheson v. Ga. DOT, 280 Ga. App. 192, 633 S.E.2d 569 (2006).

Trial court did not err in granting summary judgment to a city on allegations of negligence asserted against it by an injured motorcycle driver, as the Recreational Property Act (Act), O.C.G.A. § 51-3-20 et seq., prevented the driver from recovering from the city based on allegations of simple negligence; moreover, the Act clearly applied because it was undisputed that the injuries occurred when the driver collided with the cable fence on the city's recreational property, and the city permitted the general public to use the park and open field where the accident occurred for recreational purposes without charge. Carroll v. City of Carrollton, 280 Ga. App. 172, 633 S.E.2d 591 (2006).

A provider of janitorial services to a hospital as an independent contractor was not liable, pursuant to O.C.G.A. §§ 51-3-22 and 51-3-25, in a slip and fall case involving a hospital employee because the employee was unable to argue that the employee entered the hospital for recreational purposes and, even if the hospital could be deemed a recreational area, the hospital as business owner and occupier could not delegate its duty to keep the premises in reasonably safe condition. Perkins v. Compass Group USA, Inc., 512 F. Supp. 2d 1296 (N.D. Ga. Mar. 7, 2007).

Pedestrian's complaint for injuries suffered while walking on a city-owned recreational walkway were barred by the Recreational Property Act, O.C.G.A. §§ 51-3-22 and 51-3-23. The pedestrian could not circumvent the judicial admissions in the pedestrian's first complaint by amending it to remove references to "recreational." City of Chickamauga v. Hentz, 300 Ga. App. 249, 684 S.E.2d 372 (2009).

City was not liable for injury, etc.

City and its employees were entitled to summary judgment under title 51, chapter 3 of the O.C.G.A. in an action seeking damages for injuries sustained by a participant in a program of the city that provided free after-school recreational and swimming therapy to certain disabled individuals. Cooley v. City of Carrollton, 249 Ga. App. 387, 547 S.E.2d 689 (2001).

Olympic Park bombing. — Summary judgment was improperly entered in favor of an Olympic Committee, where a genuine issue of material fact existed about whether the operation of the Olympic Park was a commercial or a recreational venture; on remand, the jury was ordered to resolve the question of whether the nature of the Park at the time of the underlying explosion which caused the death or injury of those involved in the litigation was commercial or recreational, and the court was to decide whether the Recreational Property Act, O.C.G.A. 51-3-20 et seq., applied to the Park and insulated the Committee from liability. Anderson v. Atlanta Comm. for the Olympic Games, Inc., 261 Ga. App. 895, 584 S.E.2d 16 (2003), aff'd, sub nom. Atlanta Comm. for the Olympic Games, Inc. v. Hawthorne, 278 Ga. 116, 598 S.E.2d 471 (2004).

Cited in Anderson v. Atlanta Comm. for Olympic Games, Inc., 273 Ga. 113, 537 S.E.2d 345 (2000); Norton v. Cobb, 284 Ga. App. 303, 643 S.E.2d 803 (2007).

51-3-23. Effect of invitation or permission to use land for recreation.

JUDICIAL DECISIONS

Public use not proven. — Trial court erred in granting summary judgment for a school board as to an injured party's personal injury claim based on the Georgia Recreational Purposes Act, specifically O.C.G.A. §§ 51-3-22 and 51-3-23, as the school board presented no evidence that the playground was open to the public and the injured party presented evidence that the playground: (1) was fenced-in; (2) was only for the use of children enrolled in the school; and (3) was not open to any segment of the general public. Hart v. Appling County Sch. Bd., 266 Ga. App. 300, 597 S.E.2d 462 (2004).

Plaintiff unable to recover for injuries.

The Georgia Recreational Property Act

provided immunity to the defendant power company as the owner of recreational property in an action arising from the murder of a teenage boy on a 65 acre tract made available at no charge to the public for boating, fishing, sailing, swimming, picnicking, camping, hunting, hiking, and scenic viewing of a lake and surrounding area since (1) the boy was not on the property to further any commercial interests of the power company, (2) there was no mixture of commercial and recreational activities taking place on the property, (3) there was no admission fee to get onto the property, no parking fees, and no costs for the use of any of the facilities once a visitor entered the property, and (4) there were no vendors on the property from whom visitors could buy anything. Hendrickson v. Georgia Power Co., 240 F.3d 966 (11th Cir. 2001).

Evidence did not show that the Georgia Department of Natural Resources violated the Georgia Recreational Property Act (RPA), O.C.G.A. § 51-3-20 et seq., because it willfully and maliciously failed to warn people of the danger posed by a debris pile that was located near a public restroom on state land, and the trial court's judgment finding that the RPA applied to an action which a spouse filed against the Department seeking damages for injuries sustained when the injured spouse tripped on the debris pile, and dismissing the action, was upheld. Lee v. Dep't of Natural Res. of Ga., 263 Ga. App. 491, 588 S.E.2d 260 (2003).

Recreational Property Act (RPA), O.C.G.A. § 51-3-20 et seq., applies to rest areas maintained by the Georgia Department of Transportation (DOT), and the DOT was entitled to summary judgment as a matter of law with regard to a visitor's premises liability and negligence suit against the DOT resulting from the visitor's trip and fall while attempting to place garbage in a trash can at a rest area, because the DOT was immune from liability as a result of the application of the RPA and the visitor failed to show that the DOT was wilful or wanton in its placement of its trash can or that it charged money for the use of their rest areas. Ga. DOT v. Thompson, 270 Ga. App. 265, 606 S.E.2d 323 (2004).

Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., was not limited to privately held land; a welcome center where a traveler was injured was recreational, and thus the department which owned the welcome center was immune from liability and any connection between brochures offered at the welcome center and the state's eventual "profit" from increased tax revenue was far too tenuous to render the venture commercial. Matheson v. Ga. DOT, 280 Ga. App. 192, 633 S.E.2d 569 (2006).

Trial court did not err in granting summary judgment to a city on allegations of negligence asserted against it by an injured motorcycle driver, as the Recreational Property Act (Act), O.C.G.A. § 51-3-20 et seq., prevented the driver from recovering from the city based on allegations of simple negligence; moreover, the Act clearly applied because it was undisputed that the injuries occurred when the driver collided with the cable fence on the city's recreational property, and the city permitted the general public to use the park and open field where the accident occurred for recreational purposes without charge. Carroll v. City of Carrollton, 280 Ga. App. 172, 633 S.E.2d 591 (2006).

Trial court properly granted summary judgment to the Georgia Department of Natural Resources and a power company in a mother's wrongful death action after the mother's child drowned at a visit to a state park as the Recreational Property Act, O.C.G.A. § 51-3-20 et seq., absolved the entities from any liability since there was no evidence that the drowning resulted from a willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. Ray v. Ga. Dep't of Natural Res., 296 Ga. App. 700, 675 S.E.2d 585 (2009).

Pedestrian's complaint for injuries suffered while walking on a city-owned recreational walkway were barred by the Recreational Property Act, O.C.G.A. §§ 51-3-22 and 51-3-23. The pedestrian could not circumvent the judicial admissions in her first complaint by amending it to remove references to "recreational." City of Chickamauga v. Hentz, 300 Ga. App. 249, 684 S.E.2d 372 (2009).

Complaint for injuries suffered on recreational walkway. — Pedestrian's complaint for injuries suffered while walking on a city-owned recreational walkway were barred by the Recreational Property Act (RPA), O.C.G.A. § 51-3-22 et seq. The pedestrian could not circumvent the judicial admissions in the pedestrian's first complaint by amending the complaint to remove references to "recreational." City of Chickamauga v. Hentz, 300 Ga. App. 249, 684 S.E.2d 372 (2009).

Factual dispute as to whether purpose of property was commercial or recreational. — Trial court erred in granting summary judgment to cemetery owner and maintenance company in a visitor's personal injury action because the evidence presented a factual dispute as to whether the owner's purpose of the property was commercial or recreational; the owner pointed to evidence reflecting that the cemetery did not limit access, was open to the public, and was available to the public for recreational purposes such as picnics, jogging, or walking pets, while the evidence also reflected that the owner operated the cemetery as part of the owner's for-profit business and sold grave sites and interment rights for burial in accordance with a commercial enterprise. Martin v. Dempsey Funeral Servs. of Ga., Inc., 319 Ga. App. 343, 735 S.E.2d 59 (2012).

Cited in Cooley v. City of Carrollton, 249 Ga. App. 387, 547 S.E.2d 689 (2001); Atlanta Comm. for the Olympic Games, Inc. v. Hawthorne, 278 Ga. 116, 598 S.E.2d 471 (2004); Norton v. Cobb, 284 Ga. App. 303, 643 S.E.2d 803 (2007).

51-3-25. Certain liability not limited.

JUDICIAL DECISIONS

Willful acts construed.

Although finding that official immunity shielded a county employee from liability for injuries suffered by a child when that child fell from a swing on county property that the employee previously inspected, and that sovereign immunity shielded the county, the trial court nonetheless erred in concluding that the Recreational Property Act, O.C.G.A. § 51-3-20 et seq., waived these immunities, as: (1) implied waivers of governmental immunity were not to be favored; (2) the employee was entitled to official or qualified immunity, which could not be waived; and (3) even assuming a partial waiver of sovereign and official immunity through enactment of the Act, no evidence was presented that the employee acted willfully and the defect complained about by the child's parent was apparent to those using the property. Norton v. Cobb, 284 Ga. App. 303, 643 S.E.2d 803 (2007), cert. denied, 2007 Ga. LEXIS 634 (Ga. 2007).

Plaintiff unable to recover for injuries.

Evidence did not show that the Georgia Department of Natural Resources violated the Georgia Recreational Property Act (RPA), O.C.G.A. § 51-3-20 et seq., because it willfully and maliciously failed to warn people of the danger posed by a debris pile that was located near a public restroom on state land, and the trial court's judgment finding that the RPA applied to an action which a spouse filed against the Department seeking damages for injuries sustained when the injured spouse tripped on the debris pile, and dismissing the action, was upheld. Lee v. Dep't of Natural Res. of Ga., 263 Ga. App. 491, 588 S.E.2d 260 (2003).

Trial court did not err in granting summary judgment to a city on allegations of negligence asserted against it by an injured motorcycle driver, as the Recreational Property Act (Act), O.C.G.A. § 51-3-20 et seq., prevented the driver from recovering from the city based on allegations of simple negligence; moreover, the Act clearly applied because it was undisputed that the injuries occurred when the driver collided with the cable fence on the city's recreational property, and the city permitted the general public to use the park and open field where the accident occurred for recreational purposes without charge. Carroll v. City of Carrollton, 280 Ga. App. 172, 633 S.E.2d 591 (2006).

A park user who fell from a swing did not show that a city had actual knowledge of a dangerous condition under O.C.G.A. § 51-3-25, as there was no evidence that any city employee had read instructions about the swing; newspaper articles did not convey such knowledge, and replacing equipment in 1999 was not probative of actual knowledge in 2003. Collins v. City of Summerville, 284 Ga. App. 54, 643 S.E.2d 305 (2007).

Although in a case where a city park user fell from a swing, there was evidence that the city had actual knowledge of the condition of the ground under the swing, the user had presented no evidence that the grass and soil beneath the swing was one involving unreasonable risk of death or serious bodily harm; moreover, the condition of the ground was readily apparent to any user of the swings. Collins v. City of Summerville, 284 Ga. App. 54, 643 S.E.2d 305 (2007).

A provider of janitorial services to a hospital as an independent contractor was not liable, pursuant to O.C.G.A. §§ 51-3-22 and 51-3-25, in a slip and fall case involving a hospital employee because the employee was unable to argue that the employee entered the hospital for recreational purposes and, even if the hospital could be deemed a recreational area, the hospital as business owner and occupier could not delegate its duty to keep the premises in reasonably safe condition. Perkins v. Compass Group USA, Inc., 512 F. Supp. 2d 1296 (N.D. Ga. Mar. 7, 2007).

Trial court properly granted summary judgment to the Georgia Department of Natural Resources and a power company in a mother's wrongful death action after the mother's child drowned at a visit to a state park as the Recreational Property Act, O.C.G.A. § 51-3-20 et seq., absolved the entities from any liability since there was no evidence that the drowning resulted from a willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. Ray v. Ga. Dep't of Natural Res., 296 Ga. App. 700, 675 S.E.2d 585 (2009).

Cited in Anderson v. Atlanta Comm. for Olympic Games, Inc., 273 Ga. 113, 537 S.E.2d 345 (2000); Cooley v. City of Carrollton, 249 Ga. App. 387, 547 S.E.2d 689 (2001); Anderson v. Atlanta Comm. for the Olympic Games, Inc., 261 Ga. App. 895, 584 S.E.2d 16 (2003).

ARTICLE 3

OWNERS OF PROPERTY USED FOR OTHER PURPOSES

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2009, Article 3 of Chapter 3 of Title 51 was created.

51-3-30. Liability of landowner or hunter for injury caused by wildlife crossing public roadway.

A landowner who allows wildlife to traverse the owner's property, or a person hunting game on such property with permission, shall be immune from civil liability for damage and injuries which may be caused by wildlife which traverse the landowner's property and enter a public roadway or right of way, provided that the conduct of the landowner or person hunting game does not constitute gross negligence or willful and wanton misconduct. (Code 1981, § 51-1-52, enacted by Ga. L. 2008, p. 702, § 4/HB 239; Code 1981, § 51-3-30, as redesignated in 2009 pursuant to Code Section 28-9-5.)

Effective date. — This Code section became effective May 13, 2008.

Cross references. — Hunting, T. 27, C. 3, A. 1.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2009, Code Section 51-1-52, as enacted by Ga. L. 2008, p. 702, § 4, was redesignated as Code Section 51-3-30.

51-3-31. Agritourism defined; immunity for civil liability; warnings.

(a) For the purposes of this Code section, the term "agritourism" shall carry the same meaning as set out in subparagraph (p)(7)(B) of Code Section 48-5-7.4.

(b) A landowner who charges admission for a person who is 18 years of age or older to hunt or fish on the owner's property or to enter the owner's property for the purposes of agritourism shall be immune from civil liability for any injuries caused by the inherent risk associated with agritourism, hunting, or fishing activity, provided that:

(1) The landowner's conduct does not constitute gross negligence or willful and wanton misconduct;

(2) The landowner has posted at the main point of entry, if present, to the property a sign with a warning notice stating the following:

(A) In the case of agritourism:

"Warning

Under Georgia law, there is no liability for an injury or death of a participant at least 18 years of age in a registered agritourism activity conducted at this registered agritourism location if such injury or death results from the inherent risks of such agritourism activity. Inherent risks of agritourism activities include, but shall not be limited to, the potential of you to act in a negligent manner that may contribute to your injury or death and the potential of another participant to act in a negligent manner that may contribute to your injury or death. You are assuming the risk of participating in this registered agritourism activity."

(B) In the case of a landowner who charges admission for a person who is 18 years of age or older to hunt or fish on the owner's property:

"Warning

Under Georgia law, there is no liability for an injury or death of a hunting or fishing participant at least 18 years of age conducted at this location if such injury or death results from the inherent risks of such hunting or fishing activity. Inherent risks of hunting or fishing activities include, but shall not be limited to, the potential

of you to act in a negligent manner that may contribute to your injury or death and the potential of another participant to act in a negligent manner that may contribute to your injury or death. You are assuming the risk of participating in this hunting or fishing activity."

The warning notice specified in this paragraph shall appear on the sign in black letters, with each letter to be a minimum of one inch in height; and

(3) The person who has paid admission to the landowner to enter such landowner's property to hunt, fish, or for the purposes of agritourism has signed a waiver of liability form stating that the person entering the landowner's property has waived all civil liability against the landowner for any injuries caused by the inherent risk associated with agritourism, hunting, or fishing activity. Such waiver of liability form shall mirror the language provided for in paragraph (2) of this subsection regarding the warning notice.

(c) This Code section shall be supplemental to all other provisions of law that provide defenses to property owners. This Code section shall not create any new cause of action against a property owner or additional liability to property owners. (Code 1981, § 51-3-31, enacted by Ga. L. 2009, p. 444, § 2/HB 529.)

Effective date. — This Code section became effective May 1, 2009. See editor's note for applicability.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2009, Code Section 51-1-53, as enacted by Ga. L. 2009, p. 444, § 2, was redesignated as Code Section 51-3-31.

Editor's notes. — Ga. L. 2009, p. 444, § 3, not codified by the General Assembly, provides that this Code section shall apply to all causes of action arising on or after May 1, 2009.

CHAPTER 4

WRONGFUL DEATH

Sec.

JUDICIAL DECISIONS

Standing. — Wrongful death laws did not contemplate the absurd result and "legal impossibility" of a wrongdoer having to sue herself to recover for the wrongful death of a spouse, which she caused, and it was equally plain that the legislature did not intend that a murdering spouse financially benefit from the murder by possessing the ability to pursue the right of action for the victim's death against any other parties potentially liable for the homicide, nor did the legislature intend that the killer render herself immune from civil liability because only she held the cause of action as the surviving spouse; such circumstances would completely subvert the very purposes of the wrongful death laws. Carringer v. Rodgers, 276 Ga. 359, 578 S.E.2d 841 (2003).

Cited in Mason v. Ford Motor Co., 307 F.3d 1271 (11th Cir. 2002).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Lightning or Electrical Storm Causing Injury or Death to Employee, 81 POF3d 1.

Am. Jur. Trials. — Sample Summations in Personal Injury and Death, 6 Am. Jur. Trials 807.

Homicide, 7 Am. Jur. Trials 477.

Airline Passenger Death Cases, 8 Am. Jur. Trials 173.

Representation of Survivors in Death Actions, 11 Am. Jur. Trials 1.

Wrongful Death Actions, 12 Am. Jur. Trials 317.

Vehicular Homicide, 13 Am. Jur. Trials 295.

Actions by or against a Decedent's Estate, 19 Am. Jur. Trials 1.

Crib Death Litigation, 37 Am. Jur. Trials 1.

Forensic Pathology in Homicide Cases, 40 Am. Jur. Trials 501.

Self-Defense in Homicide Cases, 42 Am. Jur. Trials 151.

Public School Liability: Constitutional Tort Claims for Excessive Punishment and Failure to Supervise Students, 48 Am. Jur. Trials 587.

Evaluation and Settlement of Personal Injury and Wrongful Death Cases, 53 Am. Jur. Trials 1.

Representing Automobile Accident Victims, 58 Am. Jur. Trials 283.

Ship Collision Cases: Technical and Legal Aspects; Investigation and Preparation for Suit, 63 Am. Jur. Trials 347.

51-4-1. Definitions.

JUDICIAL DECISIONS

Standing. — Legislature intended that there always be a right of recovery in the case of the homicide of a child, under O.C.G.A. § 19-7-1(c), and when the child's surviving spouse was precluded from this right of recovery, the child's parent had standing to bring a cause of action for the wrongful death of the child in order to recover for the full value of the child's life. Carringer v. Rodgers, 276 Ga. 359, 578 S.E.2d 841 (2003).

Causation. — Trial court erred in granting summary judgment for the Georgia Department of Transportation (DOT) in a wrongful death action as there was a question of fact as to causation because although the parents' evidence that there was a gouge in the shoulder the day after the collision was not direct evidence to contradict the DOT's evidence that there was not a gouge on the day of the collision, the parents' experts agreed that the severe drop-off the driver encountered when the driver left the east-side roadway and lost control of the car. Karwacki v. Ga. DOT, 276 Ga. App. 628, 624 S.E.2d 171 (2005).

Parents' wrongful death claim under O.C.G.A. § 19-7-1 pertaining to an unclipped rear seat failed on summary judgment because the unclipped seat did not contribute to their child's fatal skull

fracture, and there was thus no evidence showing proximate causation under O.C.G.A. § 51-1-11(b)(1) between the unclipped seat and the child's death; the parents also did not assert a survival action in order to permit recovery for pain and suffering in that such damages were not permitted under O.C.G.A. §§ 19-7-1 and 51-4-1. Davenport v. Ford Motor Co., No. 1:05-cv-3047-WSD, 2007 U.S. Dist. LEXIS 91245 (N.D. Ga. Dec. 11, 2007).

Georgia wrongful death statute is unusual, in that it permits recovery only for the "homicide" of various family members.

Under the Wrongful Death Act, O.C.G.A. § 51-4-1 et seq., and O.C.G.A. § 19-7-1(c), the parent of a decedent child who was murdered by the decedent's surviving spouse had standing to bring a cause of action for the wrongful death of the child against the murdering spouse and/or another individual or entity proximately causing the child's death; the parent could recover for the full value of the life of the child. Carringer v. Rodgers, 276 Ga. 359, 578 S.E.2d 841 (2003).

Negligent driving resulting in death under Georgia and Iraqi law. — Georgia law provided for recovery for wrongful death caused by negligence, O.C.G.A. § 51-4-1, and recovery for wrongful death was available in all cases in which the death of a human being resulted from a crime, or from criminal or other negligence; that included cases where the wrongful death was caused by negligent unsafe driving. Iraqi law similarly provided for a cause of action for wrongful death in Iraqi Civil Law art. 203 and Iraqi Civ. Code No. 40, art. 227, which provided that every person had the right of passage on the public road provided the person observed the safety precautions so that the person would not cause injury to a third party or to oneself in the cases where safety precautions may be taken; because the parents alleged that the company violated the lieutenant colonel's right of safe passage on a public road by negligent driving that ultimately resulted in the lieutenant colonel's death, and because the company's negligence resulted in death, a cause of action existed under Iraqi law, and Iraqi law on that issue was thus not inconsistent with Georgia public policy. Baragona v. Kuwait Gulf Link Transp. Co., 691 F. Supp. 2d 1346 (N.D. Ga. 2007).

Measure of damages.

Evidence of a decedent's sex life, abortions, missing work due to being pregnant out of wedlock, and giving up children for adoption was inadmissible in a wrongful death action prosecuted on behalf of decedent's child. Brock v. Wedincamp, 253 Ga. App. 275, 558 S.E.2d 836 (2002).

Deceased spouse being co-beneficiary of services did not discount value. — In a spouse's wrongful death suit against the Georgia Department of Transportation, the trial court did not err by allowing the surviving spouse's economic expert to testify as to the value of the deceased spouse's household services without isolating and subtracting the value the deceased spouse had received as the fact that the deceased spouse may have been a co-beneficiary of a service for the household did not discount the value of the service to the other members of the household. DOT v. Baldwin, 292 Ga. App. 816, 665 S.E.2d 898 (2008).

Wrongful death action should not include expenses of decedent's last illness. — Trial court erroneously expanded the scope of wrongful death actions under the Wrongful Death Act, O.C.G.A. § 51-4-1 et seq., to include the expenses of the decedent's last illness when the trial court satisfied the O.C.G.A. § 44-14-470(b) medical services lien of a hospital out of the limited insurance proceeds instead of satisfying the decedent's children's wrongful death claims out of the proceeds where: (1) the children filed a wrongful death complaint; (2) the available insurance proceeds were then deposited into a court registry without the decedent's estate ever making a claim for medical payments; and (3) the available insurance proceeds were insufficient to cover the children's wrongful death claims. Nash v. Allstate Ins. Co., 256 Ga. App. 143, 567 S.E.2d 748 (2002).

Parents not responsible for decedent's death while attending party. — Parents were entitled to summary judgment dismissing a wrongful death suit as there was no genuine issue of material

fact regarding whether the parents could have foreseen that the decedent would attend a party their minor child held at their home in their absence, or that the decedent would voluntarily ingest prescription drugs furnished by a third person. Tims v. Hasselberger, 298 Ga. App. 256, 679 S.E.2d 731 (2009).

Transfer of property to spouse pending unliquidated wrongful death claim. — Summary judgment was error where an issue of fact remained as to whether an unliquidated wrongful death claim at the time of a killer's property transfer without consideration to his wife rendered him insolvent and material issues remained as to fraud. Bryant v. Browning, 259 Ga. App. 467, 576 S.E.2d 925 (2003).

Intentional termination of life support a wrongful death claim, not a malpractice claim. — The trial court properly refused to dismiss a plaintiff's claim asserting tortious termination of life support based on the defendant's argument that it was really a medical malpractice claim and, therefore, required an expert medical affidavit under O.C.G.A. § 9-11-9.1; because such a claim is a suit for wrongful death, not medical malpractice, no expert medical affidavit was necessary. DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823 (2007), cert. denied, 2008 Ga. LEXIS 477 (Ga. 2008).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 8A Am. Jur. Pleading and Practice Forms, Death, § 4.

ALR. — Skier's liability for injuries to or death of another person, 75 ALR5th 583.

51-4-2. Persons entitled to bring action for wrongful death of spouse or parent; survival of action; release of wrongdoer; disposition of recovery; exemption of recovery from liability for decedent's debts; recovery not barred by child's being born out of wedlock.

Law reviews. — For annual survey article discussing trial practice and procedure, see 52 Mercer L. Rev. 447 (2000). For annual survey on appellate practice and procedure, see 61 Mercer L. Rev. 31 (2009).

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

The statutory right to bring an action for wrongful death, etc.

In a suit for legal malpractice and unjust enrichment, a superior court properly found that an attorney was entitled to summary judgment on an unjust enrichment claim because a decedent's first wife and the first wife's two children conferred no benefit on the attorney in an underlying case; neither the first wife nor the first wife's children were authorized to pursue an action for the wrongful death of the decedent as that right belonged to the second wife, the surviving spouse pursuant to O.C.G.A. § 51-4-2. Rommelman v. Hoyt, 295 Ga. App. 19, 670 S.E.2d 808 (2008), cert. denied, No. S09C0516, 2009 Ga. LEXIS 203 (Ga. 2009).

Children's rights adequately protected.

District court did not err in dismissing the claims of decedent's childrens' guardians, as decedent's spouse had a blood

relationship with the children, and was present and able to manage the estate of the deceased spouse. Mann v. Taser Int'l, Inc., 588 F.3d 1291 (11th Cir. 2009).

Addition of child as party. — Because an administratrix amended a wrongful death complaint to reflect that such was filed in both a capacity as the administratrix of the decedent's estate and as next friend of the decedent's minor children, and there was a direct connection between the old and new parties, the complaint, as amended, related back to the original complaint; further, because the record showed that the decedent's children reached their majority after the complaint was filed, the trial court did not err in adding them as real parties in interest. Rockdale Health Sys. v. Holder, 280 Ga. App. 298, 640 S.E.2d 52 (2006).

Deceased spouse being co-beneficiary of household services not discounted. — In a spouse's wrongful death suit against the Georgia Department of Transportation, the trial court did not err by allowing the surviving spouse's economic expert to testify as to the value of the deceased spouse's household services without isolating and subtracting the value the deceased spouse had received as the fact that the deceased spouse may have been a co-beneficiary of a service for the household did not discount the value of the service to the other members of the household. DOT v. Baldwin, 292 Ga. App. 816, 665 S.E.2d 898 (2008).

Lack of jurisdiction to allow exception to statute. — Intermediate appellate court erred in reversing a trial court's denial of a health care providers' motion for summary judgment in a wrongful death claim; although the trial court lacked jurisdiction to allow an exception to O.C.G.A. § 51-4-2(a) to authorize a guardian to bring the wrongful death claim, Ga. Const. 1983, Art. VI, Sec. I, Para. VIII required that the trial court's ruling be vacated and the case remanded with direction to transfer the case to superior court. Blackmon v. Tenet Healthsystem Spalding, Inc., 284 Ga. 369, 667 S.E.2d 348 (2008).

Under federal law, decedent's surviving spouse entitled to decedent's medical records. — A nursing home was obliged to release a decedent's medical records to the decedent's surviving spouse who was pursuing a wrongful death action, since under O.C.G.A. §§ 31-33-2(a)(2)(B) and 51-4-2, the spouse was authorized to access those records, and the trial court's order requiring the release of the records complied with the Health Insurance Portability and Accountability Act of 1996. Alvista Healthcare Ctr., Inc. v. Miller, 296 Ga. App. 133, 673 S.E.2d 637 (2009).

Son's right to bring action. — Under the plain language of O.C.G.A. § 51-4-2(a), the decedent's son had the right to bring a wrongful death action for the father's death and a wrongful death claim brought by the administrator of the decedent's estate was properly dismissed. King v. Goodwin, 277 Ga. App. 188, 626 S.E.2d 165 (2006).

Suit by posthumous child born out of wedlock. — Decedent's posthumous, out-of-wedlock child was entitled to pursue a wrongful death claim under O.C.G.A. § 51-4-2 to the exclusion of the decedent's parents. Under the statute pertaining to descent and distribution, O.C.G.A. § 53-2-1(a)(1), the posthumous child qualified as the decedent's child, and to ignore the laws of descent and distribution would run counter to the essence of a wrongful death claim; simply because the decedent's parents wished to share in any award did not render an inequitable result in light of the priority ordinarily given to children by O.C.G.A. § 19-7-1(c)(2). deVente v. Flora, 300 Ga. App. 10, 684 S.E.2d 91 (2009).

Decedent's children and sister lacked standing because surviving spouse was proceeding with wrongful death action. — Under O.C.G.A. § 51-4-2(a), a surviving spouse could bring a wrongful death action against drug manufacturers with respect to her husband's death, but when the surviving spouse was proceeding with the action, the decedent's children and sister did not have standing. Moore v. Mylan Inc., No. 1:11-CV-03037-MHS, 2012 U.S. Dist. LEXIS 6897 (N.D. Ga. Jan. 5, 2012).

Fruits of recovery under this section are not part of decedent's estate

and are not subject to any debt or liability of any character of deceased.

Health plan fiduciary met its burden for obtaining a preliminary injunction under Fed. R. Civ. P. 65 and 29 U.S.C. § 1132(a)(3) of ERISA as to portion of a medical malpractice settlement allocated to claims of the estate under O.C.G.A. § 51-4-5(b) for individual medical bills, but fiduciary was not entitled to a portion of the settlement allocated to decedent's daughter for a wrongful death claim under O.C.G.A. § 51-4-2(a) because the claim belonged to the daughter and not to the estate and wrongful death statute was not preempted by 29 U.S.C. § 1144(a) of ERISA in that the statute did not sufficiently "relate to" the ERISA plan. Diamond Crystal Brands, Inc. v. Wallace, 531 F. Supp. 2d 1366 (N.D. Ga. 2008).

Parent of decedent. — An adult decedent's parent did not have standing to bring a wrongful death claim under O.C.G.A. § 51-4-2, as a surviving spouse had exclusive standing to bring a wrongful death action; although an exception applied in the context of a superior court exercising its constitutionally granted powers of equity, the parent had brought the action in state court, which did not have such equitable powers. Blackmon v. Tenet Healthsystem Spalding, Inc., 288 Ga. App. 137, 653 S.E.2d 333 (2007), rev'd on other grounds, 284 Ga. 369, 667 S.E.2d 348 (2008).

Sibling of decedent allowed to amend complaint. — Decedent's sibling, as the purported representative of the decedent's spouse, filed a wrongful death suit against medical providers within five years of the alleged negligent acts and, within a reasonable time after the providers objected to the sibling's standing, filed a motion to amend the complaint to name the decedent's spouse as the real party in interest. As the proposed amendment did not "initiate" a new claim, the medical malpractice statute of repose, O.C.G.A. § 9-3-71(b), did not prevent amendment of the complaint even though the motion to amend was filed more than five years after the alleged negligence. Rooks v. Tenet Health Sys. GB, Inc., 292 Ga. App. 477, 664 S.E.2d 861 (2008).

Recovery by parent of deceased when murdered by spouse. — Where the Georgia Supreme Court concluded that because the police officer, as the son's wife and murderer, was precluded from recovery, the son's mother had standing to assert claims for her son's wrongful death and funeral expenses under Georgia law; therefore, the district court erred by dismissing the mother's state law claims. Carringer v. Rodgers, 331 F.3d 844 (11th Cir. 2003).

Marital problems as defense. — Where in the opening statement plaintiff's attorney said that the deceased and her husband had "been together since 1963," the court did not abuse its discretion in allowing testimony of the simple fact that there was a period of time the two were separated. Cornelius v. Macon-Bibb County Hosp. Auth., 243 Ga. App. 480, 533 S.E.2d 420 (2000).

Wrongful death claim for intentional termination of patient's life support tolled due to infancy of patient's child. — Two year statute of limitations for wrongful death applied to a suit alleging tortious termination of life support of a parent and that limitations period was tolled based on the infancy of the parent's child, who was born to the parent prior to the defendant terminating the parent's life support. DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823 (2007), cert. denied, 2008 Ga. LEXIS 477 (Ga. 2008).

Transfer of property to spouse pending unliquidated wrongful death claim. — Summary judgment was error where an issue of fact remained as to whether an unliquidated wrongful death claim at the time of a killer's property transfer without consideration to the killer's spouse rendered the killer insolvent and material issues remained as to fraud. Bryant v. Browning, 259 Ga. App. 467, 576 S.E.2d 925 (2003).

Cited in Williams v. Georgia Dep't of Human Resources, 272 Ga. 624, 532 S.E.2d 401 (2000).

51-4-4. Wrongful death of child.

Law reviews. — For survey article on wills, trusts, guardianships, and fiduciary administration, see 59 Mercer L. Rev. 447 (2007).

For note, "Not Just For Kids: Why Georgia's Statutory Disinheritance of Deadbeat Parents Should Extend to Intestate Adults," see 43 Ga. L. Rev. 867 (2009).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Lack of standing. — Father lacked standing to recover for the child's wrongful death pursuant to O.C.G.A. §§ 19-7-1(c) and 51-4-4, as the father had abandoned the child pursuant to O.C.G.A. § 19-7-1(b)(3); the father never supported the child, nor did the father ever visit the child in the many years after the child's hospitalization in infancy, there was no evidence that the father attempted to learn where the child resided in order to initiate visitation or support, and the father was obligated under O.C.G.A. § 19-7-2 to support the child, even though the divorce decree did not require it. Baker v. Sweat, 281 Ga. App. 863, 637 S.E.2d 474 (2006).

Recovery by parent of deceased when murdered by spouse. — Where the Georgia Supreme Court concluded that because the police officer, as the son's wife and murderer, was precluded from recovery, the son's mother had standing to assert claims for her son's wrongful death and funeral expenses under Georgia law; therefore, the district court erred by dismissing the mother's state law claims. Carringer v. Rodgers, 331 F.3d 844 (11th Cir. 2003).

Nonresident alien parents. — Because nonresident alien parents of a decedent were entitled to bring an action under O.C.G.A. § 51-4-4, an administratrix did not have standing to pursue the action under O.C.G.A. § 51-4-5. Auto Doors, Inc. v. Zivoluba, 277 Ga. App. 288, 626 S.E.2d 256 (2006).

RESEARCH REFERENCES

ALR. — Who, other than parent, may recover for loss of consortium on death of minor child, 84 ALR5th 687.

51-4-5. Recovery by personal representative for wrongful death and for certain expenses.

Law reviews. — For survey article on wills, trusts, guardianships, and fiduciary administration, see 59 Mercer L. Rev. 447 (2007).

JUDICIAL DECISIONS

Claims for wrongful death and pain and suffering are distinct.

Health plan fiduciary met its burden for obtaining a preliminary injunction under Fed. R. Civ. P. 65 and 29 U.S.C. § 1132(a)(3) of ERISA as to portion of a medical malpractice settlement allocated to claims of the estate under O.C.G.A. § 51-4-5(b) for individual medical bills, but fiduciary was not entitled to a portion of the settlement allocated to decedent's daughter for a wrongful death claim under O.C.G.A. § 51-4-2(a) because the claim belonged to the daughter and not to

the estate and wrongful death statute was not preempted by 29 U.S.C. § 1144(a) of ERISA in that the statute did not sufficiently "relate to" the ERISA plan. Diamond Crystal Brands, Inc. v. Wallace, 531 F. Supp. 2d 1366 (N.D. Ga. 2008).

Construction with O.C.G.A. § 19-7-1. — Court rejected a husband's argument that as the court-appointed personal representative of his wife's estate he was the only one vested with a cause of action for recovery of funeral, medical, and other necessary expenses resulting from his wife's death pursuant to O.C.G.A. § 51-4-5 (b); however, when there was a right of recovery under O.C.G.A. § 19-7-1, O.C.G.A. § 51-4-5 did not apply. Belluso v. Tant, 258 Ga. App. 453, 574 S.E.2d 595 (2002).

Despite evidence of a parent's cruel treatment of the parent's decedent son, the trial court erred in finding that the parent forfeited parental rights, and thus lost the status as a parent and, in so doing, lost the right to recover as an heir of the decedent's estate, as the loss of parental power did not necessarily result in a parent's loss of a right to inherit as an heir from the estate of that parent's child, short of having the parent's rights terminated prior to the child's death; hence, summary judgment against the parent on the issue was reversed. Blackstone v. Blackstone, 282 Ga. App. 515, 639 S.E.2d 369 (2006).

Determining "next of kin" by applying descent and distribution law. — In determining who was included in the term "next of kin" under O.C.G.A. § 51-4-5(a), it was appropriate to employ a previous appellate decision which answered the same question by referring to the law of descent and distribution, as once the courts interpret a statute, that interpretation becomes an integral part of the statute, under the laws of statutory construction. Hence, a share of the decedent's wrongful death settlement was to be distributed, per stripes, to the children of decedent's deceased siblings. Stewart v. Bourn, 250 Ga. App. 755, 552 S.E.2d 450 (2001).

Nonresident alien parents of decedent entitled to bring action. — Because nonresident alien parents of a decedent were entitled to bring an action under O.C.G.A. § 51-4-4, an administratrix did not have standing to pursue the action under O.C.G.A. § 51-4-5. Auto Doors, Inc. v. Zivoluba, 277 Ga. App. 288, 626 S.E.2d 256 (2006).

Wrongdoer should not profit from wrongs. — In a wrongful death action, where the surviving spouse, who was the wrongdoer responsible for the spouse's death, cannot bring the action, the cause of action belongs to the decedent's parent and a court erred in refusing to use its equitable powers to allow the decedent's parent to sue on behalf of the parent's daughter. Belluso v. Tant, 258 Ga. App. 453, 574 S.E.2d 595 (2002).

Statutory right to bring an action for wrongful death. — Where the Georgia Supreme Court concluded that because the police officer, as the son's wife and murderer, was precluded from recovery, the son's mother had standing to assert claims for her son's wrongful death and funeral expenses under Georgia law; therefore, the district court erred by dismissing the mother's state law claims. Carringer v. Rodgers, 331 F.3d 844 (11th Cir. 2003).

Under the plain language of O.C.G.A. § 51-4-2(a), the decedent's son had the right to bring a wrongful death action for the father's death and a wrongful death claim brought by the administrator of the decedent's estate was properly dismissed. King v. Goodwin, 277 Ga. App. 188, 626 S.E.2d 165 (2006).

Medical malpractice action subject to limitations under O.C.G.A. § 9-3-71(a). — Because the evidence presented on appeal adequately showed that the decedent estate's claim filed by the personal representative under O.C.G.A. § 51-4-5 was filed two months after the two-year statute of limitation under O.C.G.A. § 9-3-71(a) expired, despite the application of O.C.G.A. § 9-3-92, the trial court properly dismissed the claim as time-barred. Goodman v. Satilla Health Servs., 290 Ga. App. 6, 658 S.E.2d 792 (2008).

Cited in Alvista Healthcare Ctr. v. Miller, 286 Ga. 122, 686 S.E.2d 96 (2009).

51-4-6. Notification of licensing boards of judgments against health care provider.

(a) As used in this Code section, the term "health care provider" shall have the same meaning as set forth in Code Section 16-5-5.

(b) Within ten days of a judgment, a health care provider against whom a judgment has been obtained under the provisions of this chapter shall notify in writing the applicable licensing board for his or her licensure, certification, registration, or other authorization to conduct such health care provider's occupation so that disciplinary action may be taken as determined necessary by the applicable board. (Code 1981, § 51-4-6, enacted by Ga. L. 2012, p. 637, § 3/HB 1114.)

Effective date. — This Code section became effective May 1, 2012. See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 637, § 4/HB 1114, not codified by the General Assembly, provides that: "This Act shall not apply to any offense committed before the effective date of this Act." This Act became effective May 1, 2012.

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 278 (2012).

CHAPTER 5

LIBEL AND SLANDER

Law reviews. — For comment, "You've Got Libel: How the Can-Spam Act Delivers Defamation Liability to Spam-Fighters and Why the First Amendment Should Delete the Problem," see 58 Emory L.J. 1013 (2009).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Identification of Individual Allegedly Defamed, 1 POF2d 513.

Commercial Defamation Caused by Erroneous Credit Report Issued by Credit Reporting Agency, 9 POF2d 1.

Defamation with Actual Malice, 14 POF2d 49.

Liability for Abusive Language, 16 POF2d 493.

Sufficiency of Retraction of Defamatory Statement, 40 POF2d 649.

Invasion of Privacy by Public Disclosure of Private Facts, 43 POF2d 449.

Defamation by Employer, 5 POF3d 493.

Invasion of Privacy by False Light Publicity, 6 POF3d 585.

Affirmative Defenses in Libel Actions, 22 POF3d 305.

Libel and Slander Actions by of Against Attorneys or Physicians, 30 POF3d 53.

Liability for Supplying False Information to Credit Report Agency, 45 POF3d 221.

Proof of Liability for Violation of Privacy of Internet User by Use of Cookies or Other Means, 67 POF3d 249.

Media Outage, 68 POF3d 179.

Proof of Circumstances Establishing Constitutional Malice in a Defamation Cause of Action, 71 POF3d 321.

51-5-1. Libel defined; publication prerequisite to recovery.

Law reviews. — For comment, "Room for Error Online: Revising Georgia's Retraction Statute to Accommodate the Rise of Internet Media," see 28 Ga. St. U.L. Rev. 923 (2012).

JUDICIAL DECISIONS

Analysis

General Consideration

Elements of viable defamation claim. — A viable defamation claim under Georgia law consists of: (1) a false and defamatory statement concerning the plaintiff: (2) an unprivileged communication to a third party; (3) fault by the defendant amounting at least to negligence; and (4) special harm or the action ability of the statement irrespective of special harm. Publication of the statement is imperative and, without publication, the defamation claim fails. Saye v. Deloitte & Touche, LLP, 295 Ga. App. 128, 670 S.E.2d 818 (2008).

Cited in Georgia Bd. of Pub. Safety v. Jordan, 252 Ga. App. 577, 556 S.E.2d 837 (2001); Hoffmann-Pugh v. Ramsey, 193 F. Supp. 2d 1295 (N.D. Ga. 2002); Mathis v. Cannon, 276 Ga. 16, 573 S.E.2d 376 (2002); Simmons v. Futral, 262 Ga. App. 838, 586 S.E.2d 732 (2003); No Witness, LLC v. Cumulus Media Partners, LLC, No. 1:06-CV-1733 JEC, 2007 U.S. Dist. LEXIS 83761 (N.D. Ga. Nov. 13, 2007).

Publication

Necessity of publication.

A parent's claims of defamation against a school official were either time-barred or, if viable, failed as a matter of law because: (1) there was no claim that the alleged defamatory letter was published to anyone other than the parent; and (2) without publication, there could be no cause of action for defamation. Chisolm v. Tippens, 289 Ga. App. 757, 658 S.E.2d 147 (2008), cert. denied, 129 S. Ct. 576, 172 L.Ed.2d 431 (2008).

Control of libel required. — Defendant in a libel action was entitled to summary judgment where it was not shown that defendant exercised any control over the content of the libelous statement. Mullinax v. Miller, 242 Ga. App. 811, 531 S.E.2d 390 (2000).

Dischargeability in bankruptcy. — Count based on Tortious Interference with Business Relations is not excepted from discharge by 11 U.S.C. § 1328(a)(4) because that count did not involve personal injury. However, count II based on defamation involved personal injury and may therefore be excepted from discharge. Finally, count III, for punitive damages under O.C.G.A. § 51-12-5.1, may also be excepted from discharge under 11 U.S.C. § 1328(a)(4) to the extent punitive damages are awarded based on personal injury. Adams v. Adams (In re Adams), 478 B.R. 476 (Bankr. N.D. Ga. 2012).

Letter from accounting firm to employer sufficient publication. — With regard to a controller's claims for defamation and tortious interference against an accounting/auditing firm that wrote a letter to the controller's employer that resulted in the controller's termination from employment, the trial court erred by dismissing the complaint after concluding that the alleged defamatory statements were inactionable privileged communications that had not been published since the controller sufficiently alleged malice, the communications between the accounting/auditing firm and the employer were conditionally privileged under O.C.G.A.

§ 51-5-7, and the controller sufficiently alleged publication of the statements. Saye v. Deloitte & Touche, LLP, 295 Ga. App. 128, 670 S.E.2d 818 (2008).

Communication of information to secretary, or to others within corporate framework, is not publication.

Memorandum sent by an organization's executive director to the organization's officers regarding a payment made to the organization's treasurer and his affiliation with a corporate member was an intracorporate communication, and as such did not satisfy the publication requirement of O.C.G.A. § 51-5-1(b). Koly v. Enney, 508 F. Supp. 2d 1254 (N.D. Ga. 2007), rev'd on other grounds, 269 Fed. Appx. 861 (11th Cir. 2008).

Report on the quality of a painting job containing the writer's expression of his opinions about deficiencies in the work was not libelous. Davis v. Sherwin-Williams Co., 242 Ga. App. 907, 531 S.E.2d 764 (2000).

If a supervisor has a duty to report a matter, the supervisor's report is not considered published for purposes of the tort of libel merely because it has been placed in the subject employee's personnel file. Cartwright v. Wilbanks, 247 Ga. App. 187, 541 S.E.2d 393 (2000).

A communication made by one corporate agent to another, etc.

Memorandum in which a vice chairman of an organization alleged that the organization's vice president and treasurer acted improperly in violation of the organization's conflict of interest rules by allowing the treasurer to receive payment for work that he performed for the organization, was not actionable under O.C.G.A. § 51-5-1(b) because the memorandum was not considered to have been published in accordance with O.C.G.A. § 51-5-3 but instead was an intracorporate memorandum; it was sent only to board members and contained information related to organization business. Koly v. Enney, 269 Fed. Appx. 861 (11th Cir. 2008) (Unpublished).

Employer's investigation of employee's job performance.

Publication of allegedly defamatory information in the course of an employer's investigation of an employee's job performance, when made to persons in authority, is not "publication" within the meaning of subsection (b) and, whether the communication was made maliciously and with knowledge of falsity is immaterial when there has been no publication, for without publication there is no libel or slander. Kramer v. Kroger Co., 243 Ga. App. 883, 534 S.E.2d 446 (2000).

Public Officials

Limited-purpose public figure. — A former city employee who was indicted for theft was a limited-purpose public figure for purposes of a libel suit the employee brought. The controversy, involving the alleged theft of city money by a high-ranking official with direct control over the city's funds, constituted an issue of public concern; the employee was pivotal to the controversy; and the alleged defamation directly related to the employee's participation in the controversy. Jones v. Albany Herald Publ'g Co., 290 Ga. App. 126, 658 S.E.2d 876 (2008).

Statements attributed to school officials. — District court correctly found that the claimant's complaint alleging Georgia torts of slander, libel and defamation of character failed to identify any specific written or verbal statements attributed to the school officials, because the claimant conceded that the claimant did not know who made the statements which formed the basis of the tort claims, and Georgia tort law made it clear it had not waived its sovereign immunity for tort claims against state officers or employees. Sarver v. Jackson, No. 08-16903, 2009 U.S. App. LEXIS 19735 (11th Cir. Sept. 2, 2009) (Unpublished).

Pleading and Practice

Notice and opportunity to be heard. — Trial court erred in granting summary judgment on an election candidate's claim for defamation by a radio broadcast, as the candidate did not have a full and fair opportunity to meet and attempt to controvert the assertions with respect to that claim. Howard v. Pope, 282 Ga. App. 137, 637 S.E.2d 854 (2006).

Jury Questions

Defendant's summary question of whether character portrayed plain-

tiff was for jury. — With regard to a person's defamation suit against a book author and a publisher, the trial court properly denied the motions for summary judgment filed by the author and the publisher as the character in the book at issue shared 26 similarities with the person, the person was acknowledged to have been the inspiration for the character, and, therefore, the person was permitted to prove that, despite the fictional label, the character bore such a close resemblance to the person that a jury could reasonably conclude that the character was intended to portray the person. Smith v. Stewart, 291 Ga. App. 86, 660 S.E.2d 822 (2008).

Applicability to Specific Cases

Statement that performance of contract was inadequate. — The defendant city commissioner was entitled to summary judgment on a cause of action for defamation based on commissioner's statement that the plaintiff corporation's performance on a contract was inadequate, since such statement was an opinion, subjective by definition, and was not capable of being proved false. Info. Sys. & Networks Corp. v. City of Atlanta, 281 F.3d 1220 (11th Cir. 2002).

Statement to employer on medical condition. — An action for libel encompasses an expression in writing of a false and malicious defamation which tends to harm a person's reputation or would cause a person to be subject to public hatred, contempt, or ridicule. A hospital administrator's letter to the medical director's direct employer stating the medical director had been diagnosed with an infectious disease did not amount to actionable libel because it conveyed the truth, did not involve a publication, and was made in good faith. Nelson v. Glynn-Brunswick Hosp. Auth., 257 Ga. App. 571, 571 S.E.2d 557 (2002).

Employer's report of employee's suspected theft to police. — Even if a former employee was able to prove the elements of defamation under O.C.G.A. § 51-5-1(a), the employer was protected against the employee's defamation claims by the privilege outlined in O.C.G.A. § 51-5-7(3) because the employer acted in good faith in filing a loss report with the police when the employee, a pharmacist, was seen on a hidden camera taking hydrocodone pills from the employer's pharmacy and admitted to doing so, and 92% of the employer's medication losses occurred when the employee was working. McIntyre v. Eckerd Corp., 251 Fed. Appx. 621 (11th Cir. 2007) (Unpublished).

Advertisements between two competing companies. — Statements made by plaintiff were privileged communications, so plaintiff was entitled to summary judgment against defendants' counterclaims for libel. Hickson Corp. v. N. Crossarm Co., 235 F. Supp. 2d 1352 (N.D. Ga. 2002).

Libel action may be brought by corporation damaged by false information supplied to advertisers. — Georgia's libel statute did not preclude a corporation, as opposed to an individual, from bringing a libel action against a rival competitor based on allegations that the rival maliciously published false information to advertisers that injured the standing and business reputation of the corporation and exposed the corporation to ridicule in the business and public communities. State Farm Mut. Auto. Ins. Co. v. Hernandez Auto Painting & Body Works, 312 Ga. App. 756, 719 S.E.2d 597 (2011).

Allegations regarding credit report insufficient to support action.

Debtor's defamation claim, under O.C.G.A. § 51-5-1(a), against a creditor for reporting the creditor's repossession of collateral from the debtor to the credit reporting agencies, was properly summarily dismissed because such a claim was preempted by the Federal Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., absent the creditor's malice or willful intent to injure the debtor, which were not shown. Corbin v. Regions Bank, 258 Ga. App. 490, 574 S.E.2d 616 (2002).

Lender did not commit libel against a borrower under O.C.G.A. § 51-5-1(a) when the lender posted a foreclosure notice or when the lender reported late payments to a credit reporting agency because the borrower did not allege that the lender made any false statements. Steed v. EverHome Mortg. Co., 308 Fed. Appx. 364 (11th Cir. 2009) (Unpublished).

Publication implying criminal record.

Verdict awarding general damages in a libel suit filed by an attorney against a former client, which showed that the client published facts intimating that the attorney bribed judges, contrary to O.C.G.A. § 16-10-2, was upheld, as: (1) the jury could reasonably conclude that the attorney was a limited public figure, and was properly charged on that issue; (2) the client failed to seek any remedy regarding the verdict entered; (3) the trial court did not err in prohibiting the client from offering testimony about corrupt individuals who were exposed as a result of the publication about the attorney; and (4) based on the evidence of the publication on the client's web site, neither a directed verdict or judgment notwithstanding the verdict in the client's favor was authorized. Milum v. Banks, 283 Ga. App. 864, 642 S.E.2d 892 (2007).

Campaign literature implying criminal record. — In a 42 U.S.C. § 1983 suit by political opponents of a sheriff who, they claimed, libeled them by identifying them as criminals in campaign literature, a majority of the defamatory statements were protected by the First Amendment as rhetorical hyperbole, except for a flier displaying a mug shot of one of the citizens with a caption falsely identifying that citizen as a "convicted" criminal; being patently false, the latter statement was actionable under O.C.G.A. § 51-5-1 because only truth was a defense under O.C.G.A. § 51-5-6. Bennett v. Hendrix, 325 Fed. Appx. 727 (11th Cir. 2009) (Unpublished).

Speculation on laundering of money. — Looking at the broadcast as a whole, any defamatory implication that money flowed through the company to terrorists was presented as mere speculation. Any further implication that the company acted knowingly in laundering money to assist terrorists or terrorist groups remained so unspoken that it, too, could only be speculation and surmise. Mar-Jac Poultry, Inc. v. Katz, No. (RMC), 2011 U.S. Dist. LEXIS 33582 (DC Mar. 30, 2011).

Letter setting forth board member's judgments, tax liens, and crimes. — In a defamation suit brought by a board member of a vacation resort community owners' association against a property owner who wrote a letter detailing the board member's civil judgments, tax liens, and criminal charges, the trial court properly granted the property owner summary judgment as the statements regarding the judgments, tax liens, and criminal charges were garnered from public records and were true. Additionally, the property owner's assessment that the board member was not fit to manage the association's funds if the board member was not able to manage personal finances was the opinion of the property owner and served no basis for the defamation action. McCall v. Couture, 293 Ga. App. 305, 666 S.E.2d 637 (2008).

Teenager's promiscuity. — Summary judgment was properly entered for the newspaper defendants on a teenager's claim for false light invasion of privacy as even assuming that the articles painted the teenager in a false light as promiscuous, the teenager could not recover on the claim as the circumstances of the death of a young man in the city attorney's pool were of public interest and concern. Torrance v. Morris Publ'g Group, LLC, 281 Ga. App. 563, 636 S.E.2d 740 (2006), cert. denied, 2007 Ga. LEXIS 160 (Ga. 2007).

Defamation of political candidate.

Trial court erroneously granted summary judgment against an election candidate, and in favor of the incumbent, on the former's defamation claims stemming a printed newspaper advertisement, as issues of fact remained as to the actual malice exhibited by the incumbent in publishing the advertisement, and the flagrant accusations stated therein went beyond the criticism, hostility and unfairness a candidate might expect to encounter while running for political office. Howard v. Pope, 282 Ga. App. 137, 637 S.E.2d 854 (2006).

Statements made in good faith performance of private duty. — Because a report and videotape prepared by an investigator in connection with plaintiff's workers compensation claim were privileged communications, the trial court did not err in granting summary judgment against plaintiff on defamation claim aris-

ing from production of the report and videotape. Association Servs., Inc. v. Smith, 249 Ga. App. 629, 549 S.E.2d 454 (2001).

Newspaper article and headline. — In an action by a contractor against a newspaper and the newspaper's editor because: (1) the average reader would have interpreted a printed headline's use of the term "rape" as an attempt to convey the severity of the damage to the land that the contractor inflicted rather than to characterize the contractor's conduct that resulted in the damage as criminal; and (2) the article referred to by the headline did not constitute libel per se, as the editor unquestionably did not intend, and readers did not interpret, the word "rape" as having any sexual connotation in the context used in the article, the editor and the newspaper were properly granted summary judgment as to the contractor's libel and libel per se claims. Lucas v. Cranshaw, 289 Ga. App. 510, 659 S.E.2d 612 (2008).

Reporter mistaken about crime not libel. — In a libel suit, a former city employee who was indicted for theft did not show that a reporter acted with actual malice in writing that the employee pled guilty to a felony, when the employee actually pleaded nolo contendere to a misdemeanor, and that the employee paid $4,700 in restitution for funds the employee "stole," when the restitution order did not give the purpose of the restitution. The reporter stated that the reporter had been "mixed up" about the nature of the plea and thought that the crime was a felony because the restitution exceeded $500; the only indication on the indictment, which was on felony charges, that the employee pled guilty to lesser charges was a small handwritten note; and the reporter's conclusion that the restitution was to replace stolen money was a reasonable inference drawn from the indictment, which charged the employee with theft by taking. Furthermore, the employee did not show that the newspaper acted with actual malice by leaving online for seven months an uncorrected version of the article that contained inaccurate statements about the employee's plea and restitution. Jones v. Albany Herald Publ'g Co., 290 Ga. App. 126, 658 S.E.2d 876 (2008).

Newspaper cartoon. — Since (1) an exaggerated cartoon character appearing in defendant newspaper was not recognizable as plaintiff; (2) the headline of the accompanying article did not refer to plaintiff; and (3) the article did not in any way reflect upon plaintiff or plaintiff's employment, plaintiff's claims of libel, libel per se, and invasion of privacy (false light and appropriation) were properly dismissed on summary judgment. Collins v. Creative Loafing Savannah, Inc., 264 Ga. App. 675, 592 S.E.2d 170 (2003).

Allegation of criminal activity in a radio broadcast by anonymous caller. — Trial court erred in granting summary judgment to a media company in a defamation action pursuant to O.C.G.A. §§ 51-5-1 and 51-5-4; the trial court erred in finding that a musician was a public figure, as the musician was only known locally, and a false claim by an anonymous caller played on the air by a disc jockey was not a matter of public concern, and erred in finding that O.C.G.A. § 51-5-10(a) shielded the company, as there was an issue of fact as to whether the disc jockey made a defamatory statement as well. Riddle v. Golden Isles Broad., LLC, 275 Ga. App. 701, 621 S.E.2d 822 (2005).

Book published in Ramsey case. — Book, concerning death of the employer's child, was not defamatory as a matter of law under O.C.G.A. § 51-5-1(a) because the statements indicated that the employer did not consider the housekeeper a suspect and stated that the housekeeper was a good, sweet person. Hoffman-Pugh v. Ramsey, 312 F.3d 1222 (11th Cir. 2002).

No physical injury from defamation in book. — With regard to a person's defamation suit against a book author, a publisher, and secondary publishers, the trial court erred by denying the motions for summary judgment filed by the author, the publisher, and the secondary publishers with regard to the person's claims asserting invasion of privacy and infliction of emotional distress claims as the invasion of privacy claim was encompassed by the defamation claim, and the person failed to show any evidence of a physical injury resulting from the alleged negligence. Smith v. Stewart, 291 Ga. App. 86, 660 S.E.2d 822 (2008).

Plaintiff failed to establish that parents entertained serious doubts as to the truth. — In an action in which plaintiff, who was named by the parents of a murdered child on national television and in the parents' book about their daughter's murder as a potential suspect, filed suit against the parents, asserting both a libel and slander claim, the parents were granted summary judgment on the libel claim; plaintiff failed to establish that when the parents wrote the book, they in fact entertained serious doubts as to the truth of the publication. Wolf v. Ramsey, 253 F. Supp. 2d 1323 (N.D. Ga. 2003).

Scout leader. — Summary judgment dismissing the libel suit was error because when the letter was read as a whole, it could have been found libelous as tending to injure the Boy Scout troop leader's reputation and expose him to public hatred, contempt, and ridicule; an average reader could have reasonably construed it to state or imply that the troop leader was immoral because the leader found "nothing really wrong had occurred" when tobacco, alcohol, and pornography were distributed to scouts by a leader and scouts were sexually harassed or abused by a leader. Brittain v. Gast, 259 Ga. App. 124, 575 S.E.2d 899 (2003).

Pleading of libel sufficient based on corporate action. — Company and the owners stated a claim for libel under O.C.G.A. §§ 51-5-1 and 51-5-3 when the evidence at trial showed that the second corporation knew that the atomic absorption test results were unreliable and inaccurate, but reported those results to Georgia Department of Transportation (GDOT) anyway, which directly led to GDOT finding the company in default. Based on the chemist for the second corporation's testimony that the chemist's boss told the chemist that the samples came for the company, a reasonable jury could have found that the second corporation continued to perform the inaccurate testing for pecuniary gain, with the knowledge that the conduct would harm the company. Douglas Asphalt Co. v. Qore, Inc., No. CV206-229, 2010 U.S. Dist. LEXIS 50141 (S.D. Ga. May 20, 2010).

E-mail statement reciting facts about goods. — Trial court's grant of partial summary judgment in favor of an individual in an action by a distributor of manufactured log home packages for breach of contract and libel based on an e-mail was proper as the individual recited a number of factual statements regarding structural engineering, window and door sizing, and material costs which could be disputed by the distributor, but the distributor failed to present any evidence that those statements were not true. Barna Log Homes of Ga., Inc. v. Wischmann, 310 Ga. App. 844, 714 S.E.2d 402 (2011), cert. denied, No. S11C1800, 2012 Ga. LEXIS 218 (Ga. 2012).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 16B Am. Jur. Pleading and Practice Forms, Libel and Slander, § 2.

ALR. — Libel and slander: statements regarding labor relations or disputes, 94 ALR5th 149.

Defamation of manufacturer, regarding product, other than through statement charging breach or nonperformance of contract, 104 ALR5th 523.

Defamation of building contractor or subcontractor other than through statement charging breach or nonperformance of contract, 106 ALR5th 475.

Defamation of member of clergy, 108 ALR5th 495.

Defamation of church member by church or church official, 109 ALR5th 541.

Criticism or disparagement of physician's character, competence, or conduct as defamation, 16 ALR6th 1.

Defamation of psychiatrist, psychologist, or counselor, 67 ALR6th 437.

51-5-2. Newspaper libel defined; publication prerequisite to recovery.

Law reviews. — For annual survey of tort law, see 58 Mercer L. Rev. 385 (2006). For annual survey on law of torts, see 61 Mercer L. Rev. 335 (2009). For annual survey of law on torts, see 62 Mercer L. Rev. 317 (2010).

JUDICIAL DECISIONS

Publication on website compared. — Verdict awarding general damages in a libel suit filed by an attorney against a former client, which showed that the client published facts intimating that the attorney bribed judges, contrary to O.C.G.A. § 16-10-2, was upheld, as: (1) the jury could reasonably conclude that the attorney was a limited public figure, and was properly charged on that issue; (2) the client failed to seek any remedy regarding the verdict entered; (3) the trial court did not err in prohibiting the client from offering testimony about corrupt individuals who were exposed as a result of the publication about the attorney; and (4) based on the evidence of the publication on the client's web site, neither a directed verdict or judgment notwithstanding the verdict in the client's favor was authorized. Milum v. Banks, 283 Ga. App. 864, 642 S.E.2d 892 (2007).

Opinions expressed in letter to editor about police officer. — Former police officer sued a newspaper for libel based on a letter to the editor the newspaper printed. As a public figure, the officer had to establish actual malice on the part of the newspaper under O.C.G.A. § 51-5-7(9) and New York Times Co. v. Sullivan, 376 U.S. 254 (1964), but failed to do so because the statements at issue were opinions that were not susceptible of being proved true or false. Evans v. Sandersville Georgian, Inc., 296 Ga. App. 666, 675 S.E.2d 574 (2009).

Article based on reports of police authorities. — Trial court's denial of summary judgment motions filed by a newspaper and a reporter in a libel action brought by a healthcare worker was error because truthful reports of information received from any arresting officer or police authorities were conditionally privileged under O.C.G.A. § 51-5-7(8), and the articles at issue accurately reflected statements in a police investigative report and made by a sheriff; the reporter's affidavit reflected that the reporter accurately reported statements made by the sheriff, and the healthcare worker did not come forward with any evidence to rebut the reporter's affidavit. Additionally, reading a headline in conjunction with one of the articles, the average reader would have believed that the healthcare worker had been arrested and charged with aiding another to escape from custody, which was true at the time. Cmty. Newspaper Holdings, Inc. v. King, 299 Ga. App. 267, 682 S.E.2d 346 (2009).

Jury question.

Trial court erred by granting summary judgment to a publisher in a former creative director's defamation suit regarding a story published that the creative director was demoted for poor performance as opposed to having stepped down voluntarily as a result of not enjoying certain executive aspects of the promotion because there was sufficient evidence to create a jury issue on each essential element of the claim, such as whether the creative director was demoted voluntarily or whether it was due to unsatisfactory performance, and the falsity of the report, which depended on whether the demotion resulted from dissatisfaction or not. However, the trial court properly granted the creative director's former employer and its chief executive officer summary judgment on an invasion of privacy claim since the creative director had signed a release after termination of employment, which expressly stated that the former employer and the chief executive officer were not liable for any invasion of privacy claim. Gettner v. Fitzgerald, 297 Ga. App. 258, 677 S.E.2d 149 (2009).

Summary judgment in favor of a newspaper was proper. — Summary

judgment in favor of a newspaper in a father's defamation case was proper because the newspaper's statements that accurately reflected an incident report prepared by police officers and the father's arrest warrant were privileged, a statement that the father was trying to protect the daughter by preparing a false lab report and making false statements was the opinion of the writer, and thus was not libelous, and a statement that the father was removed from a position with the police department's crimestoppers the day of the arrest was substantially true, since the father was removed one week after the arrest, and was therefore not false for purposes of defamation. Austin v. PMG Acquisition, LLC, 278 Ga. App. 539, 629 S.E.2d 417 (2006).

Summary judgment was properly granted for the newspaper defendants on a teenager's libel claim as the statement that the teenager's window had to be nailed shut to prevent the teenager from letting boys in the teenager's room was privileged as it was based on information received from police authorities; the teenager did not come forward with evidence of malice. Torrance v. Morris Publ'g Group, LLC, 281 Ga. App. 563, 636 S.E.2d 740 (2006), cert. denied, 2007 Ga. LEXIS 160 (Ga. 2007).

Decision granting summary judgment in favor of a newspaper corporation and various reporters on a decedent's claims of libel was proper as a reasonable reader would have understood information allegedly linking the decedent to a bombing was preliminary in nature and published during the very early stages of an ongoing investigation into the bombing. Bryant v. Cox Enters., 311 Ga. App. 230, 715 S.E.2d 458 (2011), cert. denied, No. S11C1916, 2012 Ga. LEXIS 37 (Ga. 2012).

Cited in Mathis v. Cannon, 276 Ga. 16, 573 S.E.2d 376 (2002).

RESEARCH REFERENCES

ALR. — Liability of newspaper for libel and slander — 21st century cases, 22 ALR6th 553.

51-5-3. What constitutes publication of libel.

Law reviews. — For comment, "Room for Error Online: Revising Georgia's Retraction Statute to Accommodate the Rise of Internet Media," see 28 Ga. St. U.L. Rev. 923 (2012).

JUDICIAL DECISIONS

Necessity of publication.

A parent's claims of defamation against a school official were either time-barred or, if viable, failed as a matter of law because: (1) there was no claim that the alleged defamatory letter was published to anyone other than the parent; and (2) without publication, there could be no cause of action for defamation. Chisolm v. Tippens, 289 Ga. App. 757, 658 S.E.2d 147 (2008), cert. denied, 129 S. Ct. 576, 172 L.Ed.2d 431 (2008).

Statute of limitations barred claim. — Conspiracy to defame action against a police officer was properly dismissed on statute of limitations grounds as: (1) under O.C.G.A. § 51-5-3, a libel was published as soon as it was communicated, and the claim accrued no later than the date of the officer's last communication with the newspaper defendants; (2) there was no evidence that the officer directed or procured the reporters to record and publish the officer's comments; (3) under O.C.G.A. § 9-3-33, a party had one year from the date that a slanderous statement was uttered or published to bring suit; (4) case law did not support the teenager's claim that the limitation period for conspiracy to defame ran from the date of the publication of the articles; and (5) an invasion of privacy claim was not an injury to the teenager's person and was not subject to the two-year limitation period

in O.C.G.A. § 9-3-33 since the interest protected was clearly that of reputation. Torrance v. Morris Publ'g Group, LLC, 281 Ga. App. 563, 636 S.E.2d 740 (2006), cert. denied, 2007 Ga. LEXIS 160 (Ga. 2007).

Intracorporate communications. — Memorandum in which a vice chairman of an organization alleged that the organization's vice president and treasurer acted improperly in violation of the organization's conflict of interest rules by allowing the treasurer to receive payment for work that he performed for the organization, was not actionable under O.C.G.A. § 51-5-1(b) because the memorandum was not considered to have been published in accordance with O.C.G.A. § 51-5-3 but instead was an intracorporate memorandum because it was sent only to board members and contained information related to organization business. Koly v. Enney, 269 Fed. Appx. 861 (11th Cir. 2008) (Unpublished).

Cited in Kramer v. Kroger Co., 243 Ga. App. 883, 534 S.E.2d 446 (2000); Mathis v. Cannon, 276 Ga. 16, 573 S.E.2d 376 (2002); Gettner v. Fitzgerald, 297 Ga. App. 258, 677 S.E.2d 149 (2009).

RESEARCH REFERENCES

ALR. — Criticism or disparagement of physician's character, competence, or conduct as defamation, 16 ALR6th 1.

51-5-4. Slander defined; when special damage required; when damage inferred.

Law reviews. — For survey article on law of torts, see 59 Mercer L. Rev. 397 (2007). For survey article on tort law, see 60 Mercer L. Rev. 375 (2008).

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability to Specific Cases

General Consideration

False statement about trade required. — Slander per se pursuant to O.C.G.A. § 51-5-4(a)(3) is a false statement against a plaintiff in reference to the plaintiff's trade, office, or profession, calculated to injure the plaintiff therein. Crown Andersen, Inc. v. Georgia Gulf Corp., 251 Ga. App. 551, 554 S.E.2d 518 (2001).

Tort of trade libel not recognized under Georgia law. — Georgia law did not recognize the tort of trade libel because the tort of trade libel overlapped with several torts already recognized under Georgia law, particularly defamation and tortious interference with business relations. State Farm Mut. Auto. Ins. Co. v. Hernandez Auto Painting & Body Works, 312 Ga. App. 756, 719 S.E.2d 597 (2011).

Elements of viable defamation claim. — A viable defamation claim under Georgia law consists of: (1) a false and defamatory statement concerning the plaintiff: (2) an unprivileged communication to a third party; (3) fault by the defendant amounting at least to negligence; and (4) special harm or the action ability of the statement irrespective of special harm. Publication of the statement is imperative and, without publication, the defamation claim fails. Saye v. Deloitte & Touche, LLP, 295 Ga. App. 128, 670 S.E.2d 818 (2008).

Publication.

Slander per se under O.C.G.A. § 51-5-4(a)(3) is not shown where the statements at issue pertain only to a single instance. Crown Andersen, Inc. v. Georgia Gulf Corp., 251 Ga. App. 551, 554 S.E.2d 518 (2001).

Single accusation of ignorance or lack of skill inadequate. — Language imputing to a business or professional man ignorance or mistake on a single occasion and not accusing that individual of general ignorance or lack of skill is not slander per se under O.C.G.A. § 51-5-4(a)(3). Crown Andersen, Inc. v. Georgia Gulf Corp., 251 Ga. App. 551, 554 S.E.2d 518 (2001).

Complaint failed to state claim for defamation. — Although an ex-spouse's complaint described the ex-spouse's business ventures before asserting that the defendants inflicted injury to the ex-spouse's reputation, as the complaint pled neither a defamatory statement in reference to the ex-spouse's trade, office, or profession under O.C.G.A. § 51-5-4(a)(3), nor special damages under § 51-5-4(a), the defamation claims failed. Walker v. Walker, 293 Ga. App. 872, 668 S.E.2d 330 (2008).

Mortgage borrower failed to state a claim for slander based on a loan servicer's alleged communication of false information regarding the borrower's payment history to credit reporting agencies and an insurer; the borrower did not allege that the servicer made any oral statement to those third parties. The borrower did not state a claim for libel because the complaint did not sufficiently allege that any false written statements were made with malice. Stroman v. Bank of Am. Corp., 852 F. Supp. 2d 1366 (N.D. Ga. 2012).

Dischargeability in bankruptcy. — Count based on tortious interference with business relations is not excepted from discharge by 11 U.S.C. § 1328(a)(4) because that count did not involve personal injury. However, count II based on defamation involved personal injury and may therefore be excepted from discharge. Finally, count III, for punitive damages under O.C.G.A. § 51-12-5.1, may also be excepted from discharge under 11 U.S.C. § 1328(a)(4) to the extent punitive damages are awarded based on personal injury. Adams v. Adams (In re Adams), 478 B.R. 476 (Bankr. N.D. Ga. 2012).

Must reference trade or business. — Determination as to a motion to dismiss for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6), required that the court evaluate whether the defamation and slander per se claims were pled sufficiently pursuant to Fed. R. Civ. P. 8(a) such that there was a viable legal theory stated and, accordingly, statements were found to be defamatory where those statements were opinion statements which implied an assertion of objective fact regarding the alleged undue influence exerted over patients and that nephrologists had no ethics or morals; however, there was no slander per se sufficiently asserted pursuant to O.C.G.A. § 51-5-4(a)(3) to avoid dismissal where statements that the nephrologists were barred from practicing at a dialysis center and that the nephrologists had been fired did not reference the center's trade or business. Davita Inc. v. Nephrology Assocs., P.C., 253 F. Supp. 2d 1370 (S.D. Ga. 2003).

Effect of procedural default of pleading. — By deeming claims of wrongful termination and slander as admitted due to a defendant's default in the action for failing to answer, the trial court erred by precluding the defendant from offering evidence to contradict those claims at a hearing on damages, since the well-pled allegations of the complaint failed to allege that the defendant's oral statements imputing a crime to the plaintiff were made to anyone outside of the professional corporation; therefore, the plaintiff's complaint failed to state a claim for slander. Fink v. Dodd, 286 Ga. App. 363, 649 S.E.2d 359 (2007).

Defamation complaint timely filed. — Natural gas marketer's defamation complaint was timely filed because the complaint was filed on the first anniversary of the date of publication; O.C.G.A. § 1-3-1(d)(3) applies to the one-year statute of limitation for injuries to the reputation found in O.C.G.A. § 9-3-33, so that the first day shall not be counted in determining whether a claim is timely filed. Infinite Energy, Inc. v. Pardue, 310 Ga. App. 355, 713 S.E.2d 456 (2011).

Special damages must be pled. — Since the appellee did not include in an amended complaint a plea for special damages under O.C.G.A. § 9-11-9(g), the defamation count of the amended complaint was limited to a claim alleging

slander per se; employment of the Milkovich factors determined only that the alleged opinion was actionable as slander, but the Milkovich factors had no bearing on whether the words used constituted slander per se; statements which could have been interpreted as having the purpose of injuring the appellee's business by stating or implying that the appellee was going out of the real estate development business in which the appellee was still engaged and leaving the area, were not recognizable as injurious on their face, and the appellant was entitled to summary judgment on the appellee's slander per se claim. Bellemeade, LLC v. Stoker, 280 Ga. 635, 631 S.E.2d 693 (2006).

Damages. — General damages for slander may be recovered under O.C.G.A. § 51-12-2(a) where a defendant has intentionally and wantonly injured the plaintiff's reputation through slander without proof of any amount; where an injured party claimed that the slander concerned the injured party's profession, damage was inferred under O.C.G.A. § 51-5-4(b). Galardi v. Steele-Inman, 259 Ga. App. 249, 576 S.E.2d 555 (2002).

Cited in Hoffmann-Pugh v. Ramsey, 193 F. Supp. 2d 1295 (N.D. Ga. 2002); Draper v. Reynolds, 278 Ga. App. 401, 629 S.E.2d 476 (2006); Taylor v. Calvary Baptist Temple, 279 Ga. App. 71, 630 S.E.2d 604 (2006).

Applicability to Specific Cases

Alleging improper conduct by plaintiff in course of business.

Radio personality adequately stated a claim for slander per quod under O.C.G.A. § 51-5-4(a)(4) against a former on-air partner for implying to listeners that the radio personality had been fired for misconduct because such an implication, although not actionable per se, injured the radio personality in the radio personality's trade or business and caused special damages in the form of future lost job prospects. No Witness, LLC v. Cumulus Media Partners, LLC, No. 1:06-CV-1733 JEC, 2007 U.S. Dist. LEXIS 83761 (N.D. Ga. Nov. 13, 2007).

Because a genuine issue of material fact existed as to whether a 42 U.S.C. § 1983 plaintiff wrote postdated checks with present consideration for payment of a business debt, the issue whether the payee slandered plaintiff under O.C.G.A. § 51-5-4(a)(1) by making unfounded accusations and conspiring with a sheriff's deputy to incarcerate the plaintiff until the plaintiff covered the checks could not be summarily determined as a matter of law. Brown v. Camden County, 583 F. Supp. 2d 1358 (S.D. Ga. 2008).

Trial court erred in dismissing a natural gas marketer's defamation action pursuant to O.C.G.A. § 9-11-12(b)(6) because the complaint stated a claim for defamation; the complaint alleged that an attorney, a law firm, and a communications company falsely stated that the marketer engaged in deliberate misinformation and deceived, cheated, and misled the marketer's customers by charging the customers artificially inflated rates after a hurricane and that the marketer suffered damage to the marketer's character, reputation, and business as a result of the statements, and given that market rates for natural gas were quantifiable, the defamatory statements were capable of being proved false. Infinite Energy, Inc. v. Pardue, 310 Ga. App. 355, 713 S.E.2d 456 (2011).

Action by company against employees for defamation. — In an action by a corporation against two former employees and a competitor, the corporation alleged that one of the employees made three statements to current employees and others: that the former employee had lied to the corporation's customers; that the corporation was looking for a buyer; and that the corporation was beefing up the corporation's books to make a sale go through. The trial court did not err in granting summary judgment on the defamation claims because the statements were not defamatory per se. The first statement only alleged that the former employee lied, not that the employee was directed to do so by the corporation. The second and third statements were neither damaging nor derogatory. Gordon Document Prods. v. Serv. Techs., 308 Ga. App. 445, 708 S.E.2d 48 (2011).

Alleging plaintiff has disease.

Although an allegation of slander encompassed a charge that a person had a contagious disorder that allowed for that

person to be excluded from society, the lab technician's oral report to the lab director and the lab director's oral report to the hospital administrator that the medical director had tested positive for an infectious disease did not constitute actionable slander as the oral report conveyed the truth, did not involve a publication, and was not shown to have been made other than in good faith. Nelson v. Glynn-Brunswick Hosp. Auth., 257 Ga. App. 571, 571 S.E.2d 557 (2002).

Statements made in intra-corporate investigation of employee privileged. — An employee sued the employer for defamation based on a confidential investigation of charges of the employee's alleged misconduct. The claim failed as: (1) the employee produced no evidence of any defamatory statement; and (2) statements made during intra-corporate investigations conducted in good faith performance of a private duty were privileged and were not "published" for purposes of a defamation claim. Lewis v. Meredith Corp., 293 Ga. App. 747, 667 S.E.2d 716 (2008).

To accuse another of crime punishable by law is slander.

Unidentified loss prevention supervisor who escorted a terminated employee off the employer's premises and was present during the meeting in which the employee was terminated for failing to disclose a crime on an application had authority to know why the employee was terminated; publication to the unidentified supervisor did not preclude summary judgment for the defendants in the employee's slander suit, even though the employee and the unidentified supervisor did not work in the same location. McClesky v. Home Depot, Inc., 272 Ga. App. 469, 612 S.E.2d 617 (2005).

Employee who was back-up supervisor had a qualified privilege to receive information that an employee was terminated for failure to disclose a crime on an application because, the back-up supervisor was a friend to the terminated employee and initiated the request for information and persisted in questioning the reason for the termination, the back-up supervisor's ability to complete work was directly impacted by the termination, and the back up supervisor was provided the information in confidence and privacy. McClesky v. Home Depot, Inc., 272 Ga. App. 469, 612 S.E.2d 617 (2005).

Trial court erred in directing a verdict in favor of a dentist on a former employee's slander claim; statements made by the dentist to others that indicated that the employee filed a false police report regarding the dentist's assault and battery of the employee were sufficient to support a claim for slander per se under O.C.G.A. § 51-5-4. Ferman v. Bailey, 292 Ga. App. 288, 664 S.E.2d 285 (2008).

Statement using the term "illegal."

In accord with Parks v. Multimedia Technologies, Inc. See Dagel v. Lemcke, 245 Ga. App. 243, 537 S.E.2d 694 (2000).

Remark which neither specified the nature of the alleged "illegal activities" nor whether the purported "illegal activities" bore any relationship to scouting or to a scoutmaster was not slander under O.C.G.A. § 51-5-4(a)(1). McGee v. Gast, 257 Ga. App. 882, 572 S.E.2d 398 (2002).

Terminated employee's allegations concerning state board's purported statements to the media that the employee was engaged in extravagant seminars and was misusing state funds constituted slander. Georgia Bd. of Pub. Safety v. Jordan, 252 Ga. App. 577, 556 S.E.2d 837 (2001).

Slander claim not preempted by Labor Management Relations Act. — Trial court erred in dismissing an employee's claim that a union business agent slandered the employee because no interpretation of collective bargaining agreements was required, and the employee could proceed on the claim since the claim was not preempted by § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185; to the extent the employee contended that the agent made statements in the agent's individual capacity to individuals outside the scope of the collective bargaining agreements, then those statements would have been made outside the scope of the agent's employment, and the statements would not be privileged as the good faith performance of a legal duty. Eason v. Marine Terminals Corp., 309 Ga. App. 669, 710 S.E.2d 867 (2011).

Defamation based on drug testing claim preempted by Labor Manage-

ment Relations Act. — Trial court did not err in dismissing an employee's claim that a union business agent slandered the employee because the claim required the interpretation of collective bargaining agreements and were preempted by § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185; it was necessary to interpret collective bargaining agreements to determine whether the agent's statements were privileged as the good faith performance of a legal duty pursuant to O.C.G.A. § 51-5-7(2). Eason v. Marine Terminals Corp., 309 Ga. App. 669, 710 S.E.2d 867 (2011).

Alleging plaintiff's demotion was for unsatisfactory performance versus voluntary. — Trial court erred by granting summary judgment to a publisher in a former creative director's defamation suit regarding a story published that the creative director was demoted for poor performance as opposed to having stepped down voluntarily as a result of not enjoying certain executive aspects of the promotion because there was sufficient evidence to create a jury issue on each essential element of the claim, such as whether the creative director was demoted voluntarily or whether it was due to unsatisfactory performance, and the falsity of the report, which depended on whether the demotion resulted from dissatisfaction or not. However, the trial court properly granted the creative director's former employer and its chief executive officer summary judgment on an invasion of privacy claim since the creative director had signed a release after termination of employment, which expressly stated that the former employer and the chief executive officer were not liable for any invasion of privacy claim. Gettner v. Fitzgerald, 297 Ga. App. 258, 677 S.E.2d 149 (2009).

Statements made in good faith performance of private duty. — Because a report and videotape prepared by an investigator in connection with plaintiff's workers compensation claim were privileged communications, the trial court did not err in granting summary judgment against plaintiff on plaintiff's defamation claim arising from production of the report and videotape. Association Servs., Inc. v. Smith, 249 Ga. App. 629, 549 S.E.2d 454 (2001).

Award of $100,000 for falsely accusing plaintiff of murder not excessive. — Pursuant to O.C.G.A. § 51-12-12, a trial court set aside as excessive a jury's award to a musician of $100,000 in general damages for slander per se committed by a radio station personality. This was error since the evidence showed the radio broadcast falsely accusing the musician of murder damaged the musician's reputation and career, which was based on the musician's reputation as a positive role model for fathers. Riddle v. Golden Isles Broad., LLC, 292 Ga. App. 888, 666 S.E.2d 75 (2008).

Special damages shown. — Defamation plaintiff, a radio personality, alleged sufficient facts to make plausible a finding of special damages, a required element of a claim for slander per quod under O.C.G.A. § 51-5-4(b) because, under the Twombly pleading standard, the plaintiff alleged that disparaging on-air statements by defendant, the plaintiff's former radio partner, could have negative consequences on the plaintiff's potential listenership, fans, and potential future employment in radio. No Witness, LLC v. Cumulus Media Partners, LLC, No. 1:06-CV-1733 JEC, 2007 U.S. Dist. LEXIS 83761 (N.D. Ga. Nov. 13, 2007).

Scatological or hyperbolic statements not actionable as defamation per se. — Radio personality failed to adequately state a claim for slander per se under O.C.G.A. § 51-5-4(a)(3) against a former on-air partner for making disparaging and scatological on-air comments about the plaintiff's character and appearance, and the quality of a film that the plaintiff had released because the comments amounted to opinion or immature name-calling that no listener would believe described a fact that could be proved false. No Witness, LLC v. Cumulus Media Partners, LLC, No. 1:06-CV-1733 JEC, 2007 U.S. Dist. LEXIS 83761 (N.D. Ga. Nov. 13, 2007).

Oral allegation of child abuse to Department of Family and Children Services amounted to publication. — Although under O.C.G.A. § 49-5-40(b), reports made to the Department of Family

and Children Services (DFACS) are confidential, the law of defamation requires only that the statement be disseminated to any person other than the person slandered. Therefore, a landlord's oral allegations to a DFACS employee that a tenant committed child abuse amounted to "publication" for purposes of O.C.G.A. § 51-5-4. Brown v. Rader, 299 Ga. App. 606, 683 S.E.2d 16 (2009).

Person alleging child abuse held immune from liability for slander. — As a tenant admitted at a deposition that the tenant's son was sometimes in their home, which the tenant knew was contaminated with toxic mold, without a mask, the landlord had reasonable cause to allege to authorities that the tenant was guilty of child abuse, and was thus entitled to immunity from the tenant's slander claim under O.C.G.A. § 19-7-5(f). Brown v. Rader, 299 Ga. App. 606, 683 S.E.2d 16 (2009).

Allegation of criminal activity in a radio broadcast by anonymous caller. — Trial court erred in granting summary judgment to a media company in a defamation action pursuant to O.C.G.A. §§ 51-5-1 and 51-5-4; the trial court erred in finding that a musician was a public figure, as the musician was only known locally, and a false claim by an anonymous caller played on the air by a disc jockey was not a matter of public concern, and erred in finding that O.C.G.A. § 51-5-10(a) shielded the company, as there was an issue of fact as to whether the disc jockey made a defamatory statement as well. Riddle v. Golden Isles Broad., LLC, 275 Ga. App. 701, 621 S.E.2d 822 (2005).

Communications made in good faith in prosecution of crime were privileged. — Statements which were made in good faith, and in compliance with a criminal investigation, were not slanderous, and were privileged; therefore the claim was properly dismissed on a summary judgment motion. Adams v. Carlisle, 278 Ga. App. 777, 630 S.E.2d 529 (2006).

Speculation on laundering of money. — Looking at the broadcast as a whole, any defamatory implication that money flowed through the company to terrorists was presented as mere speculation. Any further implication that the company acted knowingly in laundering money to assist terrorists or terrorist groups remained so unspoken that it, too, could only be speculation and surmise. Mar-Jac Poultry, Inc. v. Katz, No. (RMC), 2011 U.S. Dist. LEXIS 33582 (DC Mar. 30, 2011).

Newspaper article and headline. — In an action by a contractor against a newspaper and the newspaper's editor because: (1) the average reader would have interpreted a printed headline's use of the term "rape" as an attempt to convey the severity of the damage to the land that the contractor inflicted rather than to characterize the contractor's conduct that resulted in the damage as criminal; and (2) the article referred to by the headline did not constitute libel per se, as the editor unquestionably did not intend, and readers did not interpret, the word "rape" as having any sexual connotation in the context used in the article, the editor and the newspaper were properly granted summary judgment as to the contractor's libel and libel per se claims. Lucas v. Cranshaw, 289 Ga. App. 510, 659 S.E.2d 612 (2008).

Although a healthcare worker argues that a newspaper headline libeled the healthcare worker by implying that the healthcare worker was, in fact, an accomplice in a prisoner escape from a hospital, a charge which was later dismissed, reading the headline in conjunction with the article, the average reader would have believed that the healthcare worker had been arrested and charged with aiding another to escape from custody, which was true at the time; the trial court's denial of a summary judgment motion filed by the newspaper and the reporter was error. Cmty. Newspaper Holdings, Inc. v. King, 299 Ga. App. 267, 682 S.E.2d 346 (2009).

Statements made were not malicious. — In an action in which plaintiff, who was named by the parents of a murdered child on national television and in the parents' book about their daughter's murder as a potential suspect, filed suit against the parents, asserting both a libel and slander claim, the parents were granted summary judgment on the slan-

der claim where the court found that: (1) even though a photograph of plaintiff appeared on the screen when the parents made the statement, it was undisputed that the parents had no control over the editing decisions; and (2) even had the parents intended to refer to plaintiff, the statements were still not malicious. Wolf v. Ramsey, 253 F. Supp. 2d 1323 (N.D. Ga. 2003).

Calling plaintiff alcoholic and promiscuous in book. — With regard to a person's defamation suit against a book author and a publisher, the trial court properly denied the motions for summary judgment filed by the author and the publisher, and properly found that the person did not need to plead nor present evidence of special damages in support of the claim as the published statements in the book that the person was a promiscuous alcoholic required no extrinsic evidence to demonstrate that the statements were injurious on their face. Smith v. Stewart, 291 Ga. App. 86, 660 S.E.2d 822 (2008).

Opinion statements regarding America's loss on Sept. 11, 2001 are not slanderous. — In a suit between feuding neighbors, the trial court properly held that the words spoken by one against the other, which the latter alleged were disparaging against America's loss on September 11, 2001, were not slanderous, as they were an expression of pure opinion, which was neither provable as true nor as false; as a result, the neighbor who uttered the allegedly slanderous comments was entitled to summary judgment on the other's claim of slander per se. Bullard v. Bouler, 286 Ga. App. 218, 649 S.E.2d 311 (2007).

Natural gas marketer not a limited purpose public figure. — Trial court erred in finding that a natural gas marketer was a limited purpose public figure because there were no affidavits, depositions, or other evidence that could support such a conclusion; the complaint and the complaint's attachments reflected that the marketer was an energy giant with at least 600 customers in Georgia who tried to maintain a class-action suit against the marketer for allegedly locking the customers into three-year contracts at inflated prices, and those statements did not show that the marketer was either a household word or that the marketer held a position of such persuasive power and influence that the marketer had to be deemed a public figure for all purposes. Infinite Energy, Inc. v. Pardue, 310 Ga. App. 355, 713 S.E.2d 456 (2011).

Alleging plaintiff misappropriated funds. — With regard to a slander count asserted by a former insurance agent against another agent, the trial court did not err by denying the other agent's motion for a directed verdict with regard to statements made that the former insurance agent misappropriated an insurance company's funds as the statements consisted of charges with regard to the former insurance agent's trade, office, or profession, calculated to injure and, therefore, were properly considered by the jury, pursuant to O.C.G.A. § 51-5-4(a)(3). Am. Southern Ins. Group, Inc. v. Goldstein, 291 Ga. App. 1, 660 S.E.2d 810 (2008), cert. denied, No. S08C1555, 2008 Ga. LEXIS 680 (Ga. 2008).

Statements attributed to school officials. — District court correctly found that the claimant's complaint alleging Georgia torts of slander, libel and defamation of character failed to identify any specific written or verbal statements attributed to the school officials, because the claimant conceded that the claimant did not know who made the statements which formed the basis of the tort claims, and Georgia tort law made it clear it had not waived its sovereign immunity for tort claims against state officers or employees. Sarver v. Jackson, No. 08-16903, 2009 U.S. App. LEXIS 19735 (11th Cir. Sept. 2, 2009) (Unpublished).

Neighbor was not liable for conspiracy to commit slander. — Judgment against a neighbor for the slander of a homeowner in the neighborhood was reversed because the neighbor was not present when another neighbor uttered slanderous remarks regarding the homeowner to a third party, and there was no evidence that that neighbor directed or acquiesced in the slander, although the two neighbors had conspired to have the homeowner arrested and to otherwise harass the homeowner. Turnage v. Kasper, 307 Ga. App. 172, 704 S.E.2d 842 (2010).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 16B Am. Jur. Pleading and Practice Forms, Libel and Slander, § 2.

Am. Jur. Proof of Facts. — Slander of Title, 7 POF2d 133.

ALR. — Defamation of church member by church or church official, 109 ALR5th 541.

Criticism or disparagement of physician's character, competence, or conduct as defamation, 16 ALR6th 1.

Defamation by television — actual malice, 42 ALR6th 353.

51-5-5. Inference of malice; rebuttal thereof; effect of rebuttal.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Lack of malice in cases of privileged communications will bar recovery.

Medical director could not recover for slander allegedly made when lab technician reported to lab director, and lab director reported to hospital administrator that the medical director had been diagnosed with an infectious disease as such communications were privileged and the medical director had not shown the privilege was defeated by actual malice as the communications were made so that people could protect themselves and not to harm the medical director. Nelson v. Glynn-Brunswick Hosp. Auth., 257 Ga. App. 571, 571 S.E.2d 557 (2002).

Opinion statements regarding America's loss on Sept. 11, 2001 are not slanderous. — In a suit between feuding neighbors, the trial court properly held that the words spoken by one against the other, which the latter alleged were disparaging against America's loss on September 11, 2001, were not slanderous, as they were an expression of pure opinion, which was neither provable as true nor as false; as a result, the neighbor who uttered the allegedly slanderous comments was entitled to summary judgment on the other's claim of slander per se. Bullard v. Bouler, 286 Ga. App. 218, 649 S.E.2d 311 (2007).

Cited in No Witness, LLC v. Cumulus Media Partners, LLC, No. 1:06-CV-1733 JEC, 2007 U.S. Dist. LEXIS 83761 (N.D. Ga. Nov. 13, 2007).

RESEARCH REFERENCES

ALR. — Criticism or disparagement of physician's character, competence, or conduct as defamation, 16 ALR6th 1.

Defamation by television — actual malice, 42 ALR6th 353.

51-5-6. Truth as justification.

JUDICIAL DECISIONS

Truth is perfect defense in civil action for libel or slander.

Fact that medical director had tested positive for an infectious disease was true; thus, the medical director's claims for libel and slander based on communications made that stated the medical director had been diagnosed with an infectious disease could not be sustained since the truth was a perfect defense in a civil action for libel

or slander. Nelson v. Glynn-Brunswick Hosp. Auth., 257 Ga. App. 571, 571 S.E.2d 557 (2002).

Memorandum in which a vice chairman of an organization alleged that the organization's vice president and treasurer acted improperly in violation of the organization's conflict of interest rules by allowing the treasurer to receive payment for work that he performed for the organization, did not present an actionable libel claim, as the information in the memorandum qualified as opinion or was true, thus presenting a defense under O.C.G.A. § 51-5-6. Koly v. Enney, 269 Fed. Appx. 861 (11th Cir. 2008) (Unpublished).

Under Georgia law, O.C.G.A. § 51-5-6, truth was an absolute defense in a defamation action. Thus, plaintiff was not likely to succeed on the merits of a defamation claim and was not entitled to a preliminary injunction. Windsor v. United States, No. 09-13998, 2010 U.S. App. LEXIS 10344 (11th Cir. May 20, 2010) (Unpublished).

Real estate developer did not show defamation on the part of home buyers because the buyers in the buyers' communications with others concerning drainage problems on the buyers' property which the buyers purchased from the developer addressed factually true information, pursuant to O.C.G.A. § 51-5-6, and the buyers' communications were privileged, pursuant to O.C.G.A. § 51-5-7, as there was no showing of malice pursuant to O.C.G.A. § 51-5-9. Chaney v. Harrison & Lynam, LLC, 308 Ga. App. 808, 708 S.E.2d 672 (2011).

False identification as convicted criminal in campaign materials. — In a 42 U.S.C. § 1983 suit by political opponents of a sheriff who, they claimed, libeled them by identifying them as criminals in campaign literature, a majority of the defamatory statements were protected by the First Amendment as rhetorical political hyperbole, except for a flier displaying a mug shot of one of the citizens with a caption falsely identifying that citizen as a "convicted" criminal; because the citizen had never been convicted, the latter statement was actionable under O.C.G.A. § 51-5-1 because truth was not a defense under O.C.G.A. § 51-5-6. Bennett v. Hendrix, 325 Fed. Appx. 727 (11th Cir. 2009) (Unpublished).

Plaintiff failed to establish that parents entertained serious doubts to the truth. — In an action in which plaintiff, who was named by the parents of a murdered child on national television and in the parents' book about their daughter's murder as a potential suspect, filed suit against the parents, asserting both a libel and slander claim, the parents were granted summary judgment on the libel claim; plaintiff failed to establish that when the parents wrote the book, they in fact entertained serious doubts as to the truth of the publication. Wolf v. Ramsey, 253 F. Supp. 2d 1323 (N.D. Ga. 2003).

Statements in letter setting forth board member's judgments, tax liens, and crimes were true. — In a defamation suit brought by a board member of a vacation resort community owners' association against a property owner who wrote a letter detailing the board member's civil judgments, tax liens, and criminal charges, the trial court properly granted the property owner summary judgment as the statements regarding the judgments, tax liens, and criminal charges were garnered from public records and were true. Additionally, the property owner's assessment that the board member was not fit to manage the association's funds if the board member was not able to manage personal finances was the opinion of the property owner and served no basis for the defamation action. McCall v. Couture, 293 Ga. App. 305, 666 S.E.2d 637 (2008).

Defense of truth inapplicable in creditor's slander of title claim. — Trial court erred in granting partial summary judgment to a limited liability company (LLC) and the company's member on a creditor's slander of title claim based on the defense of truth because the lis pendens was not valid; a prior action the LLC and member filed against a debtor, and the interests asserted therein, did not involve the real property at issue. McChesney v. IH Riverdale, LLC, 307 Ga. App. 77, 704 S.E.2d 244 (2010).

Privilege inapplicable to slander of title claim. — Defense of truth, O.C.G.A. § 51-5-6, did not entitle a limited liability company and the company's member to

summary judgment on an owner's slander of title claim because a prior action the LLC and member filed against the owner, the prior action, and the interests asserted therein, did not involve the owner's real property. Meadow Springs, LLC v. IH Riverdale, LLC, 307 Ga. App. 72, 704 S.E.2d 239 (2010).

Cited in Davis v. Sherwin-Williams Co., 242 Ga. App. 907, 531 S.E.2d 764 (2000); No Witness, LLC v. Cumulus Media Partners, LLC, No. 1:06-CV-1733 JEC, 2007 U.S. Dist. LEXIS 83761 (N.D. Ga. Nov. 13, 2007); Brown v. Camden County, 583 F. Supp. 2d 1358 (S.D. Ga. 2008).

51-5-7. Privileged communications.

Cross references. — Privileged communications, § 24-5-501 et seq.

Law reviews. — For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008). For annual survey of law on torts, see 62 Mercer L. Rev. 317 (2010).

JUDICIAL DECISIONS

Analysis

General Consideration

Good faith and good intention are necessary and essential ingredients of privileged communications.

Statements to a television station were privileged under O.C.G.A. § 51-5-7(4) and the Anti-Strategic Lawsuits Against Public Participation statute, O.C.G.A. § 9-11-11.1, as they were related to the policies and procedures of the humane society and involved issues of public concern; the activist made the statements in good faith, believing that efforts could influence or persuade government officials and the public at large to help change the problems at the humane society. Harkins v. Atlanta Humane Soc'y, 273 Ga. App. 489, 618 S.E.2d 16 (2005).

Cited in Fleming v. U-Haul Co. of Ga., 246 Ga. App. 681, 541 S.E.2d 75 (2000); No Witness, LLC v. Cumulus Media Partners, LLC, No. 1:06-CV-1733 JEC, 2007 U.S. Dist. LEXIS 83761 (N.D. Ga. Nov. 13, 2007); Shiva Mgmt., LLC v. Walker, 308 Ga. App. 878, 708 S.E.2d 710 (2011).

Statements Relating to Public Duty

Privilege of statement or communication by official. — Statement which a sheriff provided to the Georgia Department of Labor (DOL), after the sheriff decided not to rehire an employee and the employee filed a claim for workers' compensation benefits was privileged, and the trial court ruled correctly that the sheriff was entitled to summary judgment on the employee's claim alleging slander, even though the sheriff's statement was published by a newspaper one week later and the newspaper published a follow-on article which stated that the sheriff stood by the statement the sheriff made to the DOL. Cooper-Bridges v. Ingle, 268 Ga. App. 73, 601 S.E.2d 445 (2004).

Statements Relating to Private Duty

Conversations from employment situations. — In a former employer's suit to enforce noncompetition and nonsolicitation clauses, summary judgment was properly granted in favor of the

employer on a former employee's defamation counterclaim because alleged slander by a coworker was not authorized by the employer and alleged libel was only published intracompany; moreover, statements made about an employee in good faith in the performance of a duty were privileged under O.C.G.A. § 51-5-7. H&R Block Eastern Enters. v. Morris, 606 F.3d 1285 (11th Cir. 2010).

Private duty privilege must be pled as affirmative defense. — Asphalt testing company was not entitled to summary judgment regarding a defamation claim as to its test reports because the company failed to assert an affirmative defense of private duty privilege under O.C.G.A. § 51-5-7 in order to avail the company of avoidance of a defamation claim made against the testing company. Douglas Asphalt Co. v. Qore, Inc., No. CV206-229, 2009 U.S. Dist. LEXIS 11002 (S.D. Ga. Feb. 13, 2009).

Statement in student disciplinary hearing. — Expelled respiratory therapy student failed to prove malice as required under O.C.G.A. § 51-5-9 after the student's mentor in an externship program denied signing a letter the student presented as evidence at the student's expulsion hearing that the student had permission to leave the student's shift for a job interview; a showing of malice was required because the mentor's statements in the expulsion hearing were conditionally privileged under O.C.G.A. § 51-5-7. Wertz v. Allen, 313 Ga. App. 202, 721 S.E.2d 122 (2011).

Statements Relating to Speaker's Interests

Jury instruction on privileged communication properly refused. — Trial court did not err in refusing to give a jury instruction on privileged communications under O.C.G.A. § 51-5-7(3), where the materialman's lien claimant's claim of lien was not properly limited in scope; the lien claimant's lien was almost eight times the amount the claimant supplied in labor and materials for improvement of the property. Amador v. Thomas, 259 Ga. App. 835, 578 S.E.2d 537 (2003).

Conditional privilege entitled speaker to summary judgment. — Because a property owner made statements concerning valuation by a county appraiser in good faith which were limited in scope and made during a proper meeting, and such statements were based on the owner's interest in a property, the owner was entitled to a conditional privilege under O.C.G.A. §§ 51-5-7(4) and 9-11-11.1 from the appraiser's defamation claims; as the appraiser failed in the burden of showing malice by the owner, the trial court should have granted summary judgment to the owner on defamation claims as well as all tort claims based on communications, including invasion of privacy, negligence and emotional distress. Smith v. Henry, 276 Ga. App. 831, 625 S.E.2d 93 (2005).

Reports of Legislative and Judicial Bodies and Court Proceedings

The trial court erred in granting the defendant newspaper's motion for summary judgment on the issue of libel. — Summary judgment was not appropriate since material issues of fact existed as to whether the defendant exercised reasonable care in publishing an article about the plaintiff attorney and made a fair and honest report of court proceedings. Nix v. Cox Enters., Inc., 247 Ga. App. 689, 545 S.E.2d 319 (2001).

Comments of Counsel

Attorney's defamatory remark. — Where defendant failed to come forward with evidence that defamatory remark by an attorney was made to, or heard by, anyone other than defendant, the attorney was entitled to summary judgment. JarAllah v. Schoen, 243 Ga. App. 402, 531 S.E.2d 778 (2000).

Reports Based on Police Authorities

"A truthful report," as used in this section is fair and honest report of information, etc.

Summary judgment was properly granted for the newspaper defendants on a teenager's libel claim as the statement that the teenager's window had to be nailed shut to prevent the teenager from letting boys in the teenager's room was privileged as it was based on information received from police authorities; the teen-

ager did not come forward with evidence of malice. Torrance v. Morris Publ'g Group, LLC, 281 Ga. App. 563, 636 S.E.2d 740 (2006), cert. denied, 2007 Ga. LEXIS 160 (Ga. 2007).

Statements accurately reflecting report. — Two of the four statements made by a newspaper which a father claimed were false, that the father created a fake lab report which showed that the daughter had a blood alcohol content of 0.0 on the night she was cited for underage drinking, and that the actual lab report showed a blood alcohol content of 0.17, accurately reflected an incident report prepared by officers and the father's arrest warrant, and thus were privileged. Austin v. PMG Acquisition, LLC, 278 Ga. App. 539, 629 S.E.2d 417 (2006).

Newspaper articles accurately reflects statements made in police report and by sheriff. — Trial court's denial of summary judgment motions filed by a newspaper and a reporter in a libel action brought by a healthcare worker was error because truthful reports of information received from any arresting officer or police authorities were conditionally privileged under O.C.G.A. § 51-5-7(8), and the articles at issue accurately reflected statements in a police investigative report and made by a sheriff; the reporter's affidavit reflected that the reporter accurately reported statements made by the sheriff, and the healthcare worker did not come forward with any evidence to rebut the reporter's affidavit. Additionally, reading a headline in conjunction with one of the articles, the average reader would have believed that the healthcare worker had been arrested and charged with aiding another to escape from custody, which was true at the time. Cmty. Newspaper Holdings, Inc. v. King, 299 Ga. App. 267, 682 S.E.2d 346 (2009).

Acts of Public Officials

Opinions expressed in letter to editor about officer. — Former police officer sued a newspaper for libel based on a letter to the editor the newspaper printed. As a public figure, the officer had to establish actual malice on the part of the newspaper under O.C.G.A. § 51-5-7(9) and New York Times Co. v. Sullivan, 376 U.S. 254 (1964), but failed to do so because the statements at issue were opinions that were not susceptible of being proved true or false. Evans v. Sandersville Georgian, Inc., 296 Ga. App. 666, 675 S.E.2d 574 (2009).

Applicability to Specific Cases

Report on the quality of a painting job containing the writer's expression of his opinions about deficiencies in the work was privileged and did not provide a basis for plaintiff's claim of libel. Davis v. Sherwin-Williams Co., 242 Ga. App. 907, 531 S.E.2d 764 (2000).

Discussion about employee's medical condition. — Hospital administrator and contract employer had an interest in protecting the safety of their patients and their own corporate interests, and, thus, communications made by or between them that the medical director had tested positive for an infectious disease were privileged because the evidence only showed that they were pursuing those interests; the evidence did not show that their privilege to make such communications was waived as the evidence did not show the communications were made with actual malice, that is, with an intent to harm the medical director. Nelson v. Glynn-Brunswick Hosp. Auth., 257 Ga. App. 571, 571 S.E.2d 557 (2002).

Slander claim not preempted by Labor Management Relations Act. — Trial court erred in dismissing an employee's claim that a union business agent slandered the employee because no interpretation of collective bargaining agreements was required, and the employee could proceed on the claim since the claim was not preempted by § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185; to the extent the employee contended that the agent made statements in the agent's individual capacity to individuals outside the scope of the collective bargaining agreements, then those statements would have been made outside the scope of the agent's employment, and the statements would not be privileged as the good faith performance of a legal duty. Eason v. Marine Terminals Corp., 309 Ga. App. 669, 710 S.E.2d 867 (2011).

Defamation based on drug testing claim preempted by Labor Management Relations Act. — Trial court did not err in dismissing employees' defamation claims against employers because the claims required the interpretation of collective bargaining agreements and were preempted by § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185; determining whether the employees were defamed by the employers' actions of posting false positive drug test results required the examination of the employers' rights and obligations under the collective bargaining agreements to decide whether their actions were privileged or authorized. Eason v. Marine Terminals Corp., 309 Ga. App. 669, 710 S.E.2d 867 (2011).

Employer's report of employee's suspected theft to police. — Employer was protected against a former employee's defamation claims by the privilege outlined in O.C.G.A. § 51-5-7(3) because the employer acted in good faith in filing a loss report with the police when the employee, a pharmacist, was seen on a hidden camera taking hydrocodone pills from the employer's pharmacy and admitted to doing so, and 92% of the employer's medication losses occurred when the employee was working. McIntyre v. Eckerd Corp., 251 Fed. Appx. 621 (11th Cir. 2007) (Unpublished).

Communications which would otherwise be slanderous are protected as privileged, if made in good faith, etc.

Statements which were made in good faith, and in compliance with a criminal investigation, were not slanderous, and were privileged; therefore the claim was properly dismissed on a summary judgment motion. Adams v. Carlisle, 278 Ga. App. 777, 630 S.E.2d 529 (2006).

Accounting firm's statements to employer were not privileged. — With regard to a controller's claims for defamation and tortious interference against an accounting/auditing firm that wrote a letter to the controller's employer that resulted in the controller's termination from employment, the trial court erred by dismissing the complaint after concluding that the alleged defamatory statements were inactionable privileged communications that had not been published since the controller sufficiently alleged malice, the communications between the accounting/auditing firm and the employer were conditionally privileged under O.C.G.A. § 51-5-7, and the controller sufficiently alleged publication of the statements. Saye v. Deloitte & Touche, LLP, 295 Ga. App. 128, 670 S.E.2d 818 (2008).

Employer's disclosure of reason for discharge.

Unidentified loss prevention supervisor who escorted a terminated employee off the employer's premises and was present during the meeting in which the employee was terminated for failing to disclose a crime on an application had authority to know why the employee was terminated; publication to the unidentified supervisor did not preclude summary judgment for the defendants in the employee's slander suit, even though the employee and the unidentified supervisor did not work in the same location. McClesky v. Home Depot, Inc., 272 Ga. App. 469, 612 S.E.2d 617 (2005).

Employee who was back-up supervisor had a qualified privilege to receive information that an employee was terminated for failure to disclose a crime on an application because the back-up supervisor was a friend to the terminated employee and initiated the request for information and persisted in questioning the reason for the termination, the back-up supervisor's ability to complete work was directly impacted by the termination, and the back up supervisor was provided the information in confidence and privacy. McClesky v. Home Depot, Inc., 272 Ga. App. 469, 612 S.E.2d 617 (2005).

Statements made in intra-corporate investigation of employee privileged. — An employee sued the employer for defamation based on a confidential investigation of charges of the employee's alleged misconduct. The claim failed as: (1) the employee produced no evidence of any defamatory statement; and (2) statements made during intra-corporate investigations conducted in good faith performance of a private duty were privileged and were not "published" for purposes of a defamation claim. Lewis v. Meredith Corp., 293 Ga. App. 747, 667 S.E.2d 716 (2008).

Despite actual malice showing, employer immune from liability. — Where defendant president, in the good faith exercise of the president's duty to the president's non-profit farm bureau, made a communication to plaintiff employee's employer to have the employee transferred, the president came within the privilege of O.C.G.A. § 51-5-7 and the privilege was not overcome by a showing of actual malice. Culpepper v. Thompson, 254 Ga. App. 569, 562 S.E.2d 837 (2002).

Privilege inapplicable in slander of title claim. — Trial court erred in granting a limited liability company (LLC) and the company's members summary judgment in an owner's action for slander of title, tortious interference with contract, and tortious interference with economic opportunities because the LLC and member did not show that they had an interest to uphold in a commission such that they were entitled as a matter of law to the privilege set forth in O.C.G.A. § 51-5-7(3); a letter accompanying the transmission of a complaint against the owner and a notice of lis pendens on the owner's real property to a bank did not refer to a commission owed to either the LLC or member but rather to one owed to another entity. Meadow Springs, LLC v. IH Riverdale, LLC, 307 Ga. App. 72, 704 S.E.2d 239 (2010).

Advertisements between two competing companies. — Statements made by plaintiff were privileged communications, so plaintiff was entitled to summary judgment against defendants' counterclaims for libel. Hickson Corp. v. N. Crossarm Co., 235 F. Supp. 2d 1352 (N.D. Ga. 2002).

Statements made in good faith performance of private duty. — Because a report and videotape prepared by an investigator in connection with plaintiff's workers compensation claim were privileged communications, the trial court did not err in granting summary judgment against plaintiff on plaintiff's defamation claim arising from production of the report and videotape. Association Servs., Inc. v. Smith, 249 Ga. App. 629, 549 S.E.2d 454 (2001).

Attorney's privileged comments entitled summary judgment on slander claims. — Because an attorney's statements regarding a doctor, made in the form of two phone messages to the doctor's patients, were privileged, as they were made in anticipation of a lawsuit the attorney was preparing to file, were not slanderous, and did not interfere with the doctor's business relations, the attorney was entitled to summary judgment on the doctor's claims of slander and tortious interference with business relations. Vito v. Inman, 286 Ga. App. 646, 649 S.E.2d 753 (2007), cert. denied, 2007 Ga. LEXIS 770 (Ga. 2007).

Not applicable in fraud claims. — Trial court erred by granting summary judgment to an estate executor in a suit asserting fraud and other claims brought by two siblings as the trial court incorrectly determined that the privileges set forth in O.C.G.A. §§ 51-5-7(2) and 51-5-8 applied to the fraud claims and neither collateral estoppel nor res judicata barred the action since a prior probate court proceeding did not involve the same issues. Further, the probate court would have had no jurisdiction over the fraud and intentional interference with a gift claims. Morrison v. Morrison, 284 Ga. 112, 663 S.E.2d 714 (2008).

Attorney's conduct in custody dispute not necessarily privileged. — Although nearly all of an ex-spouse's allegations against an attorney involved the attorney's conduct in a custody dispute, as the complaint alleged the attorney lied about the ex-spouse's mental health and spread negative information about the ex-spouse, it was conceivable that the ex-spouse could establish that some of these acts were not privileged under O.C.G.A. § 51-5-7(7) and were tortious. Thus, those claims should not have been dismissed. Walker v. Walker, 293 Ga. App. 872, 668 S.E.2d 330 (2008).

Statements by home buyers about drainage problems. — Real estate developer did not show defamation on the part of home buyers because the buyers in the buyers' communications with others concerning drainage problems on the buyers' property which the buyers purchased from the developer addressed factually true information, pursuant to O.C.G.A. § 51-5-6, and the buyers' communications

were privileged, pursuant to O.C.G.A. § 51-5-7, as there was no showing of malice pursuant to O.C.G.A. § 51-5-9. Chaney v. Harrison & Lynam, LLC, 308 Ga. App. 808, 708 S.E.2d 672 (2011).

RESEARCH REFERENCES

ALR. — Immunity of police or other law enforcement officer from liability in defamation action, 100 ALR5th 341.

Defamation of church member by church or church official, 109 ALR5th 541.

Individual and corporate liability for libel and slander in electronic communications, including e-mail, internet and websites, 3 ALR6th 153.

Libel and slander: construction and application of the neutral reportage privilege, 13 ALR6th 111.

Liability of newspaper for libel and slander — 21st century cases, 22 ALR6th 553.

51-5-8. Absolute privilege of allegations in pleadings.

Law reviews. — For annual survey of construction law, see 56 Mercer L. Rev. 109 (2004). For annual survey on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009).

JUDICIAL DECISIONS

Privilege inapplicable to improperly filed lis pendens.

Trial court erred in granting partial summary judgment to a limited liability company (LLC) and the company's member on a creditor's slander of title claim because the act of the LLC and member of sending copies of a notice of lis pendens and complaint to a bank did not fall under the absolute privilege contained in O.C.G.A. § 51-5-8; the lis pendens was not valid because a prior action the LLC and member filed against a debtor, and the interests asserted therein, did not involve the real property at issue. McChesney v. IH Riverdale, LLC, 307 Ga. App. 77, 704 S.E.2d 244 (2010).

Privilege inapplicable when lis pendens invalid. — Trial court erred in granting a limited liability company and the company's members summary judgment in an owner's action for slander of title, tortious interference with contract, and tortious interference with economic opportunities because the act of sending copies of a notice of lis pendens on the owner's property and a complaint against the owner to a bank did not fall under the absolute privilege of O.C.G.A. § 51-5-8 since the lis pendens was not valid. Meadow Springs, LLC v. IH Riverdale, LLC, 307 Ga. App. 72, 704 S.E.2d 239 (2010).

Lien filing privileged.

While liens were improperly filed by a supplier, the property owner failed to show that the statements in the lien notices were false; further, the trial court could also have found that the liens were privileged under O.C.G.A. § 51-5-8, and thus, dismissal of the owner's slander of title action was proper. Roofing Supply of Atlanta, Inc. v. Forrest Homes, Inc., 279 Ga. App. 504, 632 S.E.2d 161 (2006).

Summary judgment was properly granted to real property buyers in an action by the sellers, alleging slander of title under O.C.G.A. § 51-9-11, as the sellers failed to assert actionable claims where lis pendens filed against the property were proper and privileged under O.C.G.A. § 51-5-8; further, any failure to remove or properly mark the lis pendens pursuant to O.C.G.A. § 44-14-612 after the sellers voluntarily dismissed the claim did not form the basis of a slander of title claim against the buyers. Exec. Excellence, LLC v. Martin Bros. Invs., LLC, 309

Ga. App. 279, 710 S.E.2d 169 (2011).

Section not applicable to liens.

A lien is not a pleading for purposes of O.C.G.A. § 51-5-8 and statements made within a surveyor's lien are not afforded absolute privilege until the lien becomes attached to a lawsuit and verified notice of the suit is filed under O.C.G.A. § 44-14-361.1, at which point, the lien becomes an act of legal, or judicial process, and achieves the formality, solemnity, and status of a sworn statement. Simmons v. Futral, 262 Ga. App. 838, 586 S.E.2d 732 (2003).

Libel claim by debtor untimely. — Trial court did not err in entering judgment in favor of a company on a debtor's libel claim because the debtor's claim was untimely under O.C.G.A. § 9-3-33; the debtor's libel claim was based upon the company's allegations in a deficiency claim against the debtor, which was filed in January 2007, and the company's subsequent failure to dismiss the claim after the debt was discharged in bankruptcy in March 2008, and the debtor first asserted the claim in September 2009. Furthermore, the trial court did not err because the debtor's allegations were privileged under O.C.G.A. § 51-1-8 and, as such, were not libelous as a matter of law. Sevostiyanova v. Tempest Recovery Servs., 307 Ga. App. 868, 705 S.E.2d 878 (2011).

Privilege applicable to EEOC proceedings. — Equal Employment Opportunity Commission (EEOC) proceedings were quasi-judicial in nature, thus, the former employers' statements to the EEOC in response to the former employee's EEOC charge were absolutely privileged under O.C.G.A. § 51-5-8 and the employee's defamation claim failed on the employers' motion for summary judgment. Collins v. Onyx Waste Servs. of N. Am., LLC, No. 7:04-cv-70 (HL), 2005 U.S. Dist. LEXIS 38258 (M.D. Ga. Dec. 20, 2005).

Disclosure of promissory note with borrower's social security number attached to complaint was privileged. — A borrower could not recover against a lender for invasion of privacy or violation of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 et seq., based on the lender's attaching the note on which it sought to recover, which contained the borrower's Social Security number, to its complaint. The pleading was privileged under O.C.G.A. § 51-5-8. Finnerty v. State Bank & Trust Co., 301 Ga. App. 569, 687 S.E.2d 842 (2009).

Letter from accounting firm to controller's employer not privileged. — With regard to a controller's claims for defamation and tortious interference against an accounting/auditing firm that wrote a letter to the controller's employer that resulted in the controller's termination from employment, the trial court erred by dismissing the complaint after concluding that the alleged defamatory statements were inactionable privileged communications that had not been published since the controller sufficiently alleged malice, the communications between the accounting/auditing firm and the employer were conditionally privileged under O.C.G.A. § 51-5-7, and the controller sufficiently alleged publication of the statements. Saye v. Deloitte & Touche, LLP, 295 Ga. App. 128, 670 S.E.2d 818 (2008).

Slander of title claim involving corporation. — Trial court erred in granting partial summary judgment to a limited liability company (LLC) and the company's member on a creditor's slander of title claim on the ground that the filing and publication of the notice of lis pendens were privileged under O.C.G.A. § 51-5-7(3) because the LLC and member did not show that they had an interest to uphold in a commission such that they were entitled as a matter of law to the privilege set forth in O.C.G.A. § 51-5-7(3); a letter accompanying the transmission of the complaint and notice of lis pendens to a bank did not refer to a commission owed to either the LLC or the member but rather to one owed to another entity. McChesney v. IH Riverdale, LLC, 307 Ga. App. 77, 704 S.E.2d 244 (2010).

Application in criminal case. — The defendant's malice murder and aggravated battery convictions were upheld on appeal, as the trial court did not err in introducing into evidence the pleadings filed in a civil lawsuit brought by defendant against the victim and others, as the pleadings, albeit privileged, were intro-

duced to show the defendant's motive or state of mind. Taylor v. State, 282 Ga. 44, 644 S.E.2d 850 (2007), cert. denied, 552 U.S. 950, 128 S. Ct. 384, 169 L. Ed. 2d 263 (2007).

Arrest warrants. — Trial court committed no error in dismissing the defamation claim predicated on the allegedly false statements by the defendant made in the arrest warrant application and the warrant application hearing, but erred in dismissing the claim to the extent that the claim could be construed as alleging that the defendant communicated unprivileged, defamatory statements to third parties outside the context of the warrant application proceedings. Renton v. Watson, 319 Ga. App. 896, 739 S.E.2d 19 (2013).

Section not applicable to fraud claim. — Trial court erred by granting summary judgment to an estate executor in a suit asserting fraud and other claims brought by two siblings as the trial court incorrectly determined that the privileges set forth in O.C.G.A. §§ 51-5-7(2) and 51-5-8 applied to the fraud claims and neither collateral estoppel nor res judicata barred the action since a prior probate court proceeding did not involve the same issues. Further, the probate court would have had no jurisdiction over the fraud and intentional interference with a gift claims. Morrison v. Morrison, 284 Ga. 112, 663 S.E.2d 714 (2008).

Cited in Sanders v. Brown, 257 Ga. App. 566, 571 S.E.2d 532 (2002).

51-5-9. Right of action for malicious use of privilege.

JUDICIAL DECISIONS

Proof that a defendant acted with actual malice in making a statement defeats the defense of privilege under O.C.G.A. § 51-5-9. To prove actual malice, a plaintiff must show that a defendant knew that the statements were false or published them with reckless disregard of whether they were false or not; conclusory allegations by the plaintiff of malice are insufficient, in the absence of substantiating facts or circumstances, to raise a material issue for trial. Cooper-Bridges v. Ingle, 268 Ga. App. 73, 601 S.E.2d 445 (2004).

Malice not inferred.

Real estate developer did not show defamation on the part of home buyers because the buyers in the buyers communications with others concerning drainage problems on the buyers property which the buyers purchased from the developer addressed factually true information, pursuant to O.C.G.A. § 51-5-6, and the buyers communications were privileged, pursuant to O.C.G.A. § 51-5-7, as there was no showing of malice pursuant to O.C.G.A. § 51-5-9. Chaney v. Harrison & Lynam, LLC, 308 Ga. App. 808, 708 S.E.2d 672 (2011).

Sufficient allegation of malice. — With regard to a controller's claims for defamation and tortious interference against an accounting/auditing firm that wrote a letter to the controller's employer that resulted in the controller's termination from employment, the trial court erred by dismissing the complaint after concluding that the alleged defamatory statements were inactionable privileged communications that had not been published since the controller sufficiently alleged malice, the communications between the accounting/auditing firm and the employer were conditionally privileged under O.C.G.A. § 51-5-7, and the controller sufficiently alleged publication of the statements. Saye v. Deloitte & Touche, LLP, 295 Ga. App. 128, 670 S.E.2d 818 (2008).

Malice not shown. — Expelled respiratory therapy student failed to prove malice as required under O.C.G.A. § 51-5-9 after the student's mentor in an externship program denied signing a letter the student presented as evidence at the student's expulsion hearing that the student had permission to leave the student's shift for a job interview; a showing of malice was required because the mentor's statements in the expulsion hearing were conditionally privileged under

O.C.G.A. § 51-5-7. Wertz v. Allen, 313 Ga. App. 202, 721 S.E.2d 122 (2011).

If occasion of utterance renders it privileged, in which case burden is put upon plaintiff to establish malice.

When a city employee sued a city manager for defamation, due to statements made about the employee to a reporter, and the city manager asserted the defense of privilege, the employee did not defeat that defense, under O.C.G.A. § 51-5-9, by showing the city manager acted with actual malice because the city manager's evidence established a lack of malice, shifting the burden to the employee to show evidence of the city manager's malice; furthermore, the employee's nine "facts," from which he claimed malice could be inferred, did not rise above the level of conclusory allegations and speculation, and did not create a jury issue, so the city manager was entitled to summary judgment. Rabun v. McCoy, 273 Ga. App. 311, 615 S.E.2d 131 (2005).

51-5-10. Liability for defamatory statements in visual or sound broadcast; damages.

Law reviews. — For comment, "Room for Error Online: Revising Georgia's Retraction Statute to Accommodate the Rise of Internet Media," see 28 Ga. St. U.L. Rev. 923 (2012).

JUDICIAL DECISIONS

Allegation of criminal activity in a radio broadcast by anonymous caller. — Trial court erred in granting summary judgment to a media company in a defamation action pursuant to O.C.G.A. §§ 51-5-1 and 51-5-4; the trial court erred in finding that a musician was a public figure, as the musician was only known locally, and a false claim by an anonymous caller played on the air by a disc jockey was not a matter of public concern, and erred in finding that O.C.G.A. § 51-5-10(a) shielded the company, as there was an issue of fact as to whether the disc jockey made a defamatory statement as well. Riddle v. Golden Isles Broad., LLC, 275 Ga. App. 701, 621 S.E.2d 822 (2005).

Award of $100,000 for slander per se in radio broadcast not excessive. — Pursuant to O.C.G.A. § 51-12-12, a trial court set aside as excessive a jury's award to a musician of $100,000 in general damages for slander per se committed by a radio personality. This was error since the evidence showed the radio broadcast falsely accusing the musician of murder damaged the musician's reputation career, which was based on the musician's reputation as a positive role model for fathers. Riddle v. Golden Isles Broad., LLC, 292 Ga. App. 888, 666 S.E.2d 75 (2008).

Cited in Mathis v. Cannon, 276 Ga. 16, 573 S.E.2d 376 (2002).

RESEARCH REFERENCES

ALR. — Liability of internet service provider for internet or e-mail defamation, 84 ALR5th 169.

51-5-11. Admissibility of evidence in libel action concerning correction and retraction; effect thereof on damages.

Law reviews. — For comment, "Room for Error Online: Revising Georgia's Retraction Statute to Accommodate the Rise of Internet Media," see 28 Ga. St. U.L. Rev. 923 (2012).

JUDICIAL DECISIONS

"Publication," as used in O.C.G.A. § 51-5-11(b), means a communication made to any person other than the party libeled. Mathis v. Cannon, 276 Ga. 16, 573 S.E.2d 376 (2002).

Verdict awarding general damages in a libel suit filed by an attorney against a former client, which showed that the client published facts intimating that the attorney bribed judges, contrary to O.C.G.A. § 16-10-2, was upheld, as: (1) the jury could reasonably conclude that the attorney was a limited public figure, and was properly charged on that issue; (2) the client failed to seek any remedy regarding the verdict entered; (3) the trial court did not err in prohibiting the client from offering testimony about corrupt individuals who were exposed as a result of the publication about the attorney; and (4) based on the evidence of the publication, on the client's web site neither a directed verdict or judgment notwithstanding the verdict in the client's favor was authorized. Milum v. Banks, 283 Ga. App. 864, 642 S.E.2d 892 (2007).

Subsection (c) applies only to libel. Plain language of O.C.G.A. § 51-5-11 stated that the section is applicable only to any civil action for libel; a trial court erred by barring punitive damages arising from a claim of tortious interference with business relations based on O.C.G.A. § 51-5-11. U.S. Micro Corp. v. Atlantix Global Sys., LLC, 278 Ga. App. 599, 630 S.E.2d 416 (2006).

Failure to request retraction on Internet bulletin board posting. — Georgia's retraction statute, O.C.G.A. § 51-5-11, applies to libel actions involving publications on an Internet bulletin board; thus, since a limited-purpose public figure failed to request a retraction, although the public figure asked the Internet service provider to delete the messages, the public figure was precluded from obtaining punitive damages. Mathis v. Cannon, 276 Ga. 16, 573 S.E.2d 376 (2002).

Cited in No Witness, LLC v. Cumulus Media Partners, LLC, No. 1:06-CV-1733 JEC, 2007 U.S. Dist. LEXIS 83761 (N.D. Ga. Nov. 13, 2007).

RESEARCH REFERENCES

ALR. — Individual and corporate liability for libel and slander in electronic communications, including e-mail, internet and websites, 3 ALR6th 153.

51-5-12. Admissibility of evidence in defamation action concerning correction and retraction; effect on damages.

JUDICIAL DECISIONS

Cited in Mathis v. Cannon, 276 Ga. 16, 573 S.E.2d 376 (2002).

CHAPTER 6

FRAUD AND DECEIT

51-6-1. Right of action for fraud accompanied by damage.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Type of damages permitted in fraud case. — In the insured party's fraud claim against the insurer alleging a conspiracy to intentionally undervalue automobile property damage claims, the total-loss valuation under the policy's appraisal provision did not moot the fraud claim; damages in the fraud claim were not limited to damage to the vehicle and included, under O.C.G.A. § 51-6-1, damages naturally flowing from the fraud itself. McGowan v. Progressive Preferred Ins. Co., 281 Ga. 169, 637 S.E.2d 27 (2006).

Application to Specific Cases

Actionable fraud for purposes of lex loci delicti. — Because only fraud which results in damage is actionable, the "last event" necessary to make an actor liable for fraud is the injury, and consequently, for purposes of lex loci delicti, the place of the wrong is where that injury is sustained. IBM v. Kemp, 244 Ga. App. 638, 536 S.E.2d 303 (2000).

Summary judgment for a corporation was proper in fraud action. — Trial court properly granted summary judgment to a corporation on a limited liability company's fraud claim as: (1) the contract contained an integration clause and other representations could not be used to vary the contract; (2) the contract was more specific than the Georgia Limited Liability Partnership Act, specifically O.C.G.A. § 14-11-305(1), and the contract prevailed; (3) the contract provided that any member could engage in conflict of interest transactions, that the corporation could compete directly with the joint venture, and that the corporation had complete control of the joint venture's business; and (4) the corporation held 51 percent of the membership and could consent to a change in the joint venture's purpose or scope. Alimenta (USA), Inc. v. Oil Seed South, LLC, 276 Ga. App. 62, 622 S.E.2d 363 (2005).

Physician's duty to disclose risks. — Physician was not under an affirmative obligation, either under statute or common law, to disclose his drug use to his patients prior to rendering services, and his failure to make such disclosure could not be the basis for an independent cause of action against him. Albany Urology Clinic, P.C. v. Cleveland, 272 Ga. 296, 528 S.E.2d 777 (2000), reversing Cleveland v. Albany Urology Clinic, P.C., 235 Ga. App. 838, 509 S.E.2d 664 (1998).

Holder claims permitted. — In response to a certified question asking whether Georgia common law recognized fraud claims based on forbearance in the sale of publicly traded securities, the Supreme Court answered that Georgia law permitted holder claims, and the limitations imposed in other jurisdictions were appropriate. Negligent misrepresentation claims, like fraud claims, can be based on forbearance in the sale of publicly traded securities, and the direct communication and specific reliance limitations on fraud claims by "holders" also apply to negligent misrepresentation claims. Holmes v. Grubman, 286 Ga. 636, 691 S.E.2d 196 (2010).

Intentionally false statements from attorney. — While a client's complaint contained a count for fraud, the client failed to allege any specific facts to state a

cause of action for fraud pursuant to O.C.G.A. §§ 9-11-9, 51-6-1, and 51-6-2(b) because the complaint failed to allege any specific facts indicating that a former attorney intentionally made false statements to the client during the course of the representation of the client. Fortson v. Freeman, 313 Ga. App. 326, 721 S.E.2d 607 (2011).

51-6-2. When misrepresentation of material fact actionable as deceit; effect of mere concealment; knowledge of falsehood essential to deceit; when knowledge implied.

JUDICIAL DECISIONS

General Consideration

Evidence of fraud or deceit.

Where the first element of fraud was that the defendant made a false representation, once defendant pointed to the absence of evidence to support this element of plaintiff's fraud claim, plaintiff had to come forward with specific evidence giving rise to a triable issue, which he did not do. Johnson v. Rodier, 242 Ga. App. 496, 529 S.E.2d 442 (2000).

Cited in Tart v. IMV Energy Sys. of Am., 374 F. Supp. 2d 1172 (N.D. Ga. 2005); Golden Atlanta Site Dev., Inc. v. Tilson, 299 Ga. App. 646, 683 S.E.2d 166 (2009).

Application to Specific Cases

Failure to prove reliance and false representation.

Professional basketball player was not liable to inexperienced businessmen who invested and lost money by hosting sports event-related parties based on an oral agreement with two men claiming to act as the player's agents. The businessmen's fraud in the inducement claim under O.C.G.A. § 51-6-2 failed because the player did not personally make any representations to the businessmen and did not authorize or ratify any representations made by the purported agents. J'Carpc, LLC v. Wilkins, 545 F. Supp. 2d 1330 (N.D. Ga. 2008).

Bankruptcy case. — Where debtor failed to disclose to creditor that business assets were no longer available to secure a loan upon its renewal, the debt was not dischargeable in bankruptcy because the renewal was obtained by false pretenses. Suntrust Bank v. Brandon (In re Brandon), 297 Bankr. 308 (Bankr. S.D. Ga. 2002).

Misrepresentation in connection with sale of real estate.

There was no evidence from which the jury could reasonably infer that the defendant real estate agent knew about the defects in the home purchased by the plaintiff where such knowledge rested upon the assumption that because the defendant said that the sellers were "friends" and because the defendant was their listing agent, that the defendant must have known of the defects. ReMax N. Atl. v. Clark, 244 Ga. App. 890, 537 S.E.2d 138 (2000).

Trial court correctly granted summary judgment in favor of an appraisal company and a real estate appraiser on a seller's claim that they engaged in wilful misconduct because the seller alleged that the company and appraiser made wilful misrepresentations by merely choosing not to change alleged negligent misrepresentations as to fair market value after being informed of the negligence, but that did not support a claim that the company and appraiser made wilful misrepresentations. Wingate Land, LLC v. ValueFirst, Inc., 314 Ga. App. 24, 722 S.E.2d 868 (2012).

Purchaser's suit against developer. — In a purchaser's suit against a co-developer asserting claims for conversion, fraud and deceit, conspiracy to com-

mit fraud and deceit, piercing the corporate veil, punitive damages, and attorney fees and costs of litigation, the trial court properly denied the co-developer's motion for summary judgment as genuine issues of fact existed as to whether the co-developer misrepresented that the developer owned the property; whether the investment contract was a security or not; and whether the co-developer's actions supported an award of punitive damages sought by the purchaser. Of significance, it was not relevant that the co-developer was not a party to the sale/purchase agreement/investment contract at issue as the claims against the co-developer involved the alleged inducement the co-developer engaged in to have the purchaser contract with the developer. Golden Atlanta Site Dev., Inc. v. R. Nahai & Sons, Inc., 299 Ga. App. 654, 683 S.E.2d 627 (2009).

No evidence of false information from bank to property owners in foreclosure. — Property owners' intentional and negligent misrepresentation claims against a bank failed because the property owners failed to show that the bank supplied false information to the owners as required by O.C.G.A. § 51-6-2. Mortensen v. Bank of Am., N.A., No. (CDL), 2011 U.S. Dist. LEXIS 132637 (M.D. Ga. Nov. 17, 2011).

Misrepresentation of property values.

Contrary to caveator's insertion, no evidence was presented to show that testator's grandson's statements about caveator were willful misrepresentations that caused testator to change his will to disinherit caveator. Harper v. Harper, 274 Ga. 542, 554 S.E.2d 454 (2001).

Opinion evidence insufficient. — Claim that defendant sellers made false statements, when they told the plaintiff that there was no problem with the horse that would prevent him from being shown, was not proved where opinion evidence presented by plaintiff about the horse's poor prior condition and prognosis was completely refuted by evidence that the horse had successfully competed in horse shows before the sale. Sheffield v. Darby, 244 Ga. App. 437, 535 S.E.2d 776 (2000).

Unauthorized practice of law. — Defendant's fraudulent conduct in connection with unauthorized practice of law provided an evidentiary basis for the jury's verdict as to all five elements of plaintiff's fraud claim. Ledee v. Devoe, 250 Ga. App. 15, 549 S.E.2d 167 (2001).

Medical consent. — Grant of partial summary judgment pursuant to O.C.G.A. § 9-11-56 to a physician in a patient's action alleging breach of fiduciary duty and battery arising from an alleged failure to obtain valid consent prior to performing a medical procedure was erroneous where the physician had represented to the patient that the physician had made the patient's orthopedic surgeon aware of the treatment plans and that the surgeon approved of them, but there was no direct evidence that the surgeon had actually received the plans and had been aware of them and approved of them; accordingly, the jury could have found that the physician misrepresented that situation with an intent to deceive pursuant to O.C.G.A. § 51-6-2(b), which would have constituted sufficient fraud to have vitiated the consent. Petzelt v. Tewes, 260 Ga. App. 802, 581 S.E.2d 345 (2003).

Duty not established. — State benefit health plan claims administrator was properly granted summary judgment in an action challenging its review of a physician's corporation's health plan claims because, in part, the administrator had no duty to produce its policies absent a confidential relationship, which was not established merely by the corporation's trust and confidence in the administrator. Brown v. Blue Cross Blue Shield of Ga., Inc., 260 Ga. App. 796, 581 S.E.2d 636 (2003).

Intentionally false statements from an attorney. — While a client's complaint contained a count for fraud, the client failed to allege any specific facts to state a cause of action for fraud pursuant to O.C.G.A. §§ 9-11-9, 51-6-1, and 51-6-2(b) because the complaint failed to allege any specific facts indicating that a former attorney intentionally made false statements to the client during the course of the representation of the client. Fortson v. Freeman, 313 Ga. App. 326, 721 S.E.2d 607 (2011).

Misrepresentation of car's condition was fraud for action under the

Georgia Fair Business Practices Act. — Establishing an unfair or deceptive act or practice under the Georgia Fair Business Practices Act does not require proof of intentional conduct because the words "volitional" and "intentional" are not synonymous; thus, even if the used car salesman did not know whether the car had been in a wreck, since the salesman certainly knew that the salesman did not know the real condition of the car, the salesman's misrepresentation could constitute fraud under O.C.G.A. § 51-6-2(b). Marrale v. Gwinnett Place Ford, 271 Ga. App. 303, 609 S.E.2d 659 (2005).

RESEARCH REFERENCES

Am. Jur. Trials. — Misrepresentation in Automobile Sales, 13 Am. Jur. Trials 253.

51-6-4. Fraud by acts or silence; estoppel to assert title.

JUDICIAL DECISIONS

ANALYSIS

APPLICABILITY TO SPECIFIC CASES

Applicability to Specific Cases

Ownership by virtue of unrecorded deeds. — In a quiet title action brought by executors of a landowner's estate, the trial court erred in granting summary judgment to a purchaser of the property because genuine issues remained as to whether the purchaser had notice that the landowner owned the property by virtue of unrecorded deeds. There was also a genuine issue as to whether the executors were precluded by estoppel under O.C.G.A. § 51-6-4 from claiming title. Montgomery v. Barrow, 286 Ga. 896, 692 S.E.2d 351 (2010).

No fraud shown on part of developer. — In an action brought by the purchasers of a lot seeking to cancel the developer's security deed based upon alleged fraud, the trial court properly granted summary judgment to the developer as, even if the developer knew of the sale of the lot to the purchasers, such sale did not estop the developer from the developer's claim against the lot pursuant to the developer's security deed; however, the trial court did err by denying the equitable subrogation claim asserted by the purchasers' lender since exercising subrogation did not prejudice the developer in any manner. Byers v. McGuire Props., 285 Ga. 530, 679 S.E.2d 1 (2009).

CHAPTER 7

FALSE ARREST, FALSE IMPRISONMENT, MALICIOUS PROSECUTION, AND ABUSIVE LITIGATION

Article 4

Detention or Arrest on Suspicion of Shoplifting or Film Piracy

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RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Malicious Prosecution, 7 POF2d 181.

Abuse of Process — Debt Collection, 7 POF2d 413.

Malicious Prosecution — Good Faith Reliance on Advice of Counsel in Bringing Suit, 26 POF2d 275.

Wrongful Attachment, 36 POF2d 149.

Compensatory Damages for False Imprisonment, 13 POF3d 111.

Am. Jur. Trials. — Civil Consequences of Criminal Conduct, 51 Am. Jur. Trials 337.

ARTICLE 1

FALSE ARREST

Law reviews. — For annual survey on law of torts, see 61 Mercer L. Rev. 335 (2009). For annual survey on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009).

51-7-1. Right of action for false arrest.

JUDICIAL DECISIONS

Legislative intent.

Injured party was not able to recover under O.C.G.A. § 51-1-6 for the declarant's alleged violation of the criminal statutes O.C.G.A. § 16-10-26, prohibiting giving a false report of a crime, and O.C.G.A. § 16-10-24, prohibiting obstructing or hindering the police, as these statutes did not provide for a civil cause of action; furthermore, the legislature had provided statutory civil remedies in the form of false arrest under O.C.G.A. § 51-7-1 and malicious prosecution under O.C.G.A. § 51-7-40. Jastram v. Williams, 276 Ga. App. 475, 623 S.E.2d 686 (2005).

Probable cause for arrest.

Plaintiff could not sustain claims of false arrest and malicious prosecution against a police officer and city because there was no evidence of lack of probable cause or malice. Stanford v. City of Manchester, 246 Ga. App. 129, 539 S.E.2d 845 (2000).

Defendant bank was properly granted summary judgment on plaintiff patron's civil claim for false arrest after: (1) it was undisputed that the patron refused to leave the bank after being repeatedly asked by bank representatives to do so; (2)

such refusal clearly provided probable cause within the meaning of O.C.G.A. § 51-7-3 for the patron's arrest for criminal trespass under O.C.G.A. § 16-7-21(b); and (3) such probable cause defeated the "without probable cause" element of the false arrest claim under O.C.G.A. § 51-7-1. Mohamud v. Wachovia Corp., 260 Ga. App. 612, 580 S.E.2d 259 (2003).

Because the plaintiff had gone to the police stations and told two other officers that the arresting officer had better stop harassing plaintiff, and because the arresting officer had stopped the plaintiff for traffic violations on two separate occasions during the week or two prior to a parking lot incident, believing that the plaintiff was involved in drug activity, the plaintiff had failed to carry the burden of showing lack of probable cause, and the arresting officer was entitled to summary judgment on the false arrest claim. Perrin v. City of Elberton, No. 3:03-CV-106 (CDL), 2005 U.S. Dist. LEXIS 13230 (M.D. Ga. July 1, 2005).

In an action alleging false arrest, malicious prosecution, and false imprisonment, as the arresting officers were parties, not disinterested witnesses. their deposition testimony that the arrest of both plaintiffs was based solely upon their professional judgment, constituted a mere statement of self-serving opinion and a legal conclusion that could not support the grant of summary judgment; moreover, a jury, not a judge, was to construe the facts upon which such opinion was based and could reach a diametrically different conclusion to that reached by the witness. Adams v. Carlisle, 278 Ga. App. 777, 630 S.E.2d 529 (2006).

When the defendant police captain saw nude dancing plus alcohol being served, the captain had probable cause to issue a citation to the plaintiff nightclub operator for violating a county ordinance, and since there was no evidence of malice, the nightclub operator's malicious arrest claim failed. Curves, LLC v. Spalding County, 685 F.3d 1284 (11th Cir. 2012).

Question of arrest is for jury. — In a tort action filed by a parent as next friend the parent's minor daughter alleging various torts including false arrest, because the record showed that defendants took the child and led the child around by the hand, whether an arrest was made was a question of the jury. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

False arrest, false imprisonment, and malicious prosecution are not mutually exclusive, and a plaintiff can proceed before a jury on all three theories. Wal-Mart Stores, Inc. v. Johnson, 249 Ga. App. 84, 547 S.E.2d 320 (2001), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

An arrest without a warrant cannot constitute a false/malicious arrest under O.C.G.A. § 51-7-1. Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

Official immunity. — Police officer's conduct in arresting plaintiff, while unprofessional, was not willful, fraudulent, corrupt, or malicious; therefore, the officer enjoyed limited immunity. Yarbrough v. Kirkland, 249 Ga. App. 523, 548 S.E.2d 670 (2001).

Minor incapable of consent. — Summary judgment was properly denied on a parent's claim of intentional infliction of emotional distress, false arrest, false imprisonment, and invasion of privacy arising out of an accusation by store employees that the parent's nine-year-old child stole from the store because the child was below the age of 13, the age of criminal responsibility under O.C.G.A. § 16-3-1, and was legally incapable of giving consent to their actions under O.C.G.A. §§ 51-11-2 and 51-11-6. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Evidence of malice precluded grant of summary judgment. — Summary judgment was properly denied on a parent's false arrest claim under O.C.G.A. § 51-7-1 arising out of an accusation by store employees that the parent's nine-year-old child stole from the store because whether an arrest took place when employees led the child back into the store to be questioned about the alleged theft, whether they had probable cause to do so under O.C.G.A. § 51-7-3, and whether they acted maliciously under

O.C.G.A. § 51-7-2 were issues of fact to be resolved by a jury. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Summary judgment improper. — Trial court erred in granting summary judgment in favor of a corporation and the corporation's president in an employee's action alleging malicious prosecution and malicious arrest because genuine issues of fact remained as to the issues of probable cause and malice; although the president averred that the president did not know that the employee was not licensed when the president hired the employee, the affidavits the employee submitted indicated otherwise. McKissick v. S. O. A., Inc., 299 Ga. App. 772, 684 S.E.2d 24 (2009).

Trial court erred in granting summary judgment to a police officer in an arrestee's action alleging false arrest because a question of fact remained as to whether the officer apprehended the arrestee for disorderly conduct knowing that there was no probable cause to do so when nothing in the arrestee's testimony suggested that the arrestee either cursed the officer or physically obstructed the officer at any time before being handcuffed; the officer failed to provide undisputed evidence showing that an arrest for physical obstruction was justified, and the officer was not aware at the time of the arrest that the arrestee had an outstanding warrant for failure to appear. Jones v. Warner, 301 Ga. App. 39, 686 S.E.2d 835 (2009).

Trial court erred by refusing to file in forma pauperis complaint. — Trial court erred by refusing an inmate's request to proceed in forma pauperis under O.C.G.A. § 9-15-2(d) and to file the inmate's complaint because the court could not decipher the inmate's complaint as construing the complaint in the light most favorable to the inmate, the inmate did state justiciable claims for false arrest, false imprisonment, and violation of the inmate's civil rights. Thompson v. Reichert, 318 Ga. App. 23, 733 S.E.2d 342 (2012).

Cited in Desmond v. Troncalli Mitsubishi, 243 Ga. App. 71, 532 S.E.2d 463 (2000); Fleming v. U-Haul Co. of Ga., 246 Ga. App. 681, 541 S.E.2d 75 (2000); Draper v. Reynolds, 278 Ga. App. 401, 629 S.E.2d 476 (2006).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 10A Am. Jur. Pleading and Practice Forms, False Imprisonment, § 2.

51-7-2. Malice defined.

JUDICIAL DECISIONS

Malice required for malicious prosecution action. — Judgment on claim of forgery was reversed because defendant's reliance on the bare allegations of the affidavit of the payee on the check without taking any steps to verify the information in it created a fact issue for the jury about whether the defendants' acts were wanton or were done with a reckless disregard for or a conscious indifference to the rights of the plaintiff, and thus, whether defendants acted with the malice necessary to support a malicious prosecution action. McClelland v. Courson's 441 South Station, Inc., 248 Ga. App. 170, 546 S.E.2d 300 (2001).

Summary judgment precluded by factual issues. — Summary judgment was properly denied on a parent's false arrest claim under O.C.G.A. § 51-7-1 arising out of an accusation by store employees that the parent's nine-year-old child stole from the store because whether an arrest took place when employees led the child back into the store to be questioned about the alleged theft, whether they had probable cause to do so under O.C.G.A. § 51-7-3, and whether they acted mali-

ciously under O.C.G.A. § 51-7-2 were issues of fact to be resolved by a jury. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Trial court erred in denying a police officer summary judgment as to the arrestees' malicious prosecution claim because that claim was barred by official immunity when the officer's actions against the arrestees did not show malice but were an effort to restrain the arrestees and control an uncertain situation; one of the arrestees approached the officer and began arguing with the officer while the officer was speaking to a suspect in custody, and when arrestee reached into the truck to retrieve her purse, the officer was concerned for the officer's safety. Valades v. Uslu, 301 Ga. App. 885, 689 S.E.2d 338 (2009), cert. denied, No. S10C0803, 2010 Ga. LEXIS 519 (Ga. 2010).

Cited in Desmond v. Troncalli Mitsubishi, 243 Ga. App. 71, 532 S.E.2d 463 (2000); Stanford v. City of Manchester, 246 Ga. App. 129, 539 S.E.2d 845 (2000); Fleming v. U-Haul Co. of Ga., 246 Ga. App. 681, 541 S.E.2d 75 (2000).

51-7-3. Lack of probable cause defined; question for jury.

JUDICIAL DECISIONS

Probable cause was demonstrated as matter of law. — What facts and circumstances amount to probable cause is a pure question of law, but the burden of proof to show lack of probable cause is on the plaintiff and there is nothing to send to the jury if the plaintiff does not raise some evidence creating an issue of fact as to each element of the tort of false arrest; thus, defendant bank was properly granted summary judgment on plaintiff patron's claim for false arrest where: (1) it was undisputed that the patron refused to leave the bank after being repeatedly asked by bank representatives to do so; (2) such refusal clearly provided probable cause within the meaning of O.C.G.A. § 51-7-3 for the patron's arrest for criminal trespass under O.C.G.A. § 16-7-21(b); and (3) such probable cause defeated an element of the false arrest claim. Mohamud v. Wachovia Corp., 260 Ga. App. 612, 580 S.E.2d 259 (2003).

Summary judgment precluded by factual issues. — Summary judgment was properly denied on a parent's false arrest claim under O.C.G.A. § 51-7-1 arising out of an accusation by store employees that the parent's nine-year-old child stole from the store because whether an arrest took place when employees led the child back into the store to be questioned about the alleged theft, whether they had probable cause to do so under O.C.G.A. § 51-7-3, and whether they acted maliciously under O.C.G.A. § 51-7-2 were issues of fact to be resolved by a jury. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

In a malicious prosecution case brought against a medical professional company and the company's owning doctor by the company's former office manager and a former part-time worker after those former employees were charged with theft and fraud but the charges were dismissed, the trial court erred by granting the company summary judgment since there existed genuine issues of material fact as to whether a new chief operating officer hired for the company, and an agent for the company, had misrepresented the officer's knowledge that the part-time worker had been re-hired by the company to work on an office manual and paid accordingly. However, there existed no evidence that the owning doctor made any knowing misrepresentations to the investigating detective since the owning doctor had no knowledge that the part-time worker had been rehired at any time. Barnette v. Coastal Hematology & Oncology, P. C., 294 Ga. App. 733, 670 S.E.2d 217 (2008).

Summary judgment improper. — Trial court erred in granting summary judgment in favor of a corporation and the corporation's president in an employee's

action alleging malicious prosecution and malicious arrest because genuine issues of fact remained as to the issues of probable cause and malice; although the president averred that the president did not know that the employee was not licensed when the president hired the employee, the affidavits the employee submitted indicated otherwise. McKissick v. S. O. A., Inc., 299 Ga. App. 772, 684 S.E.2d 24 (2009).

Trial court erred in granting summary judgment to a police officer in an arrestee's action alleging false arrest because a question of fact remained as to whether the officer apprehended the arrestee for disorderly conduct knowing that there was no probable cause to do so when nothing in the arrestee's testimony suggested that the arrestee either cursed the officer or physically obstructed the officer at any time before being handcuffed; the officer failed to provide undisputed evidence showing that an arrest for physical obstruction was justified, and the officer was not aware at the time of the arrest that the arrestee had an outstanding warrant for failure to appear. Jones v. Warner, 301 Ga. App. 39, 686 S.E.2d 835 (2009).

Cited in Stanford v. City of Manchester, 246 Ga. App. 129, 539 S.E.2d 845 (2000); Fleming v. U-Haul Co. of Ga., 246 Ga. App. 681, 541 S.E.2d 75 (2000).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 10A Am. Jur. Pleading and Practice Forms, False Imprisonment, § 64.

51-7-4. Arrest under civil process of person exempt from such arrest.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 10A Am. Jur. Pleading and Practice Forms, False Imprisonment, § 14.

ARTICLE 2

FALSE IMPRISONMENT

Law reviews. — For annual survey on law of torts, see 61 Mercer L. Rev. 335 (2009).

51-7-20. False imprisonment defined.

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability to Specific Cases

General Consideration

Action for false imprisonment under this section will not lie where it appears that arrest and imprisonment were by virtue of valid process. See Stanford v. City of Manchester, 246 Ga. App. 129, 539 S.E.2d 845 (2000).

In accord with Grist v. White. See Flem-

ing v. U-Haul Co. of Ga., 246 Ga. App. 681, 541 S.E.2d 75 (2000).

False imprisonment, false arrest, and malicious prosecution are not mutually exclusive, and a plaintiff can proceed before a jury on all three theories. Wal-Mart Stores, Inc. v. Johnson, 249 Ga. App. 84, 547 S.E.2d 320 (2001), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

Official immunity for police personnel. — Summary judgment in favor of police personnel was proper in action against police chief and officers for false imprisonment under O.C.G.A. § 51-7-20 because the record did not show any support for plaintiff's contentions that the actions of the police officers in arresting plaintiff following an altercation demonstrated the requisite malice to overcome official immunity under state law. Plaintiff's unsupported allegations of conspiracy to frame him for an altercation are insufficient to pierce the protections of official immunity on these claims. Goree v. City of Atlanta, 276 Fed. Appx. 919 (11th Cir. 2008) (Unpublished).

Cited in Wallace v. Stringer, 250 Ga. App. 850, 553 S.E.2d 166 (2001).

Applicability to Specific Cases

Where plaintiff was not guilty of criminal offense, his arrest without warrant justified an award of damages, etc.

In a 42 U.S.C. § 1983 suit filed by a Florida businesswoman alleging false arrest based upon the business person giving postdated checks to a Georgia payee, issues of fact remained with respect to the businesswoman's false imprisonment/false arrest claims under O.C.G.A. § 51-7-20 against a Georgia sheriff's deputy and the payee; the defense in O.C.G.A. § 51-7-21 did not apply because the Georgia arrest warrant was invalid, and the safe harbor provision in O.C.G.A. § 16-9-20(h)(2) had no relevance to the good cause inquiry under O.C.G.A. § 51-7-21. Brown v. Camden County, 583 F. Supp. 2d 1358 (S.D. Ga. 2008).

Claim was ripe for adjudication. — While a city and two police officers argued that an arrestee's claim of false imprisonment under O.C.G.A. § 51-7-20 was not ripe because the arrestee's criminal prosecution had not terminated in the arrestee's favor, it was not certain that the arrest was procured by an invalid arrest warrant and it was not beyond doubt that the arrestee could prove a set of facts to support a false imprisonment claim. Holmes v. City of East Point, 2005 U.S. Dist. LEXIS 38201 (N.D. Ga. Dec. 20, 2005).

Trial court erred by refusing to file in forma pauperis complaint. — Trial court erred by refusing an inmate's request to proceed in forma pauperis under O.C.G.A. § 9-15-2(d) and to file the inmate's complaint because the court could not decipher the inmate's complaint as construing the complaint in the light most favorable to the inmate, the inmate did state justiciable claims for false arrest, false imprisonment, and violation of the inmate's civil rights. Thompson v. Reichert, 318 Ga. App. 23, 733 S.E.2d 342 (2012).

Illegal detention of plaintiff at defendant's command.

Each of the four refugees was detained without an arrest warrant and without being told of the charges against them. The refugees showed that the former Bosnian-Serb soldier subjected them to restraint and physical violence in detention and was complicit in their ongoing arbitrary detention; therefore, the former soldier was liable to the refugees under Georgia law for false imprisonment. Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002).

Illegal restraint of minor.

Summary judgment was properly denied on a parent's claim of intentional infliction of emotional distress, false arrest, false imprisonment, and invasion of privacy arising out of an accusation by store employees that the parent's nine-year-old child stole from the store because the child was below the age of 13, the age of criminal responsibility under O.C.G.A. § 16-3-1, and was legally incapable of giving consent to their actions under O.C.G.A. §§ 51-11-2 and 51-11-6. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Whether unlawful detention took place was factual question. — Summary judgment was properly denied on a parent's false imprisonment claim under O.C.G.A. § 51-7-20 arising out of an accusation by store employees that the parent's nine-year-old child stole from the store, even if the child were old enough to consent, because whether the child was unlawfully detained or imprisoned when an employee led the child back into the store by the hand for questioning about the alleged theft was a factual question to be resolved by a jury. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Wrong person arrested.

Restaurant manager told a security guard to follow a car the manager believed was occupied by patrons who had left without paying; it was actually occupied by siblings who had paid their bill. As police detained the siblings without a warrant, the siblings had a claim for false imprisonment under O.C.G.A. § 51-7-20; neither malice nor lack of probable cause had to be shown, and it was not alleged that the siblings were arrested pursuant to exigent circumstances. Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

Detention not found.

The trial court did not err in granting summary judgment to an employer on an employee's claim for false imprisonment since there was no evidence that the employee was ever physically restrained in an office or threatened with physical force. The employee argued that the employee was threatened with the loss of the employee's job and with criminal prosecution, but such threats did not constitute detention for purposes of a false imprisonment claim. Shannon v. Office Max N. Am., Inc., 291 Ga. App. 834, 662 S.E.2d 885 (2008).

Photographer could not establish a claim for false imprisonment because the assistant chief of police was acting under the auspices of a valid temporary protective order (TPO) when the assistant chief of police ordered the photographer to leave a council meeting, and the later dismissal of a council member's petition for stalking TPO did not change the fact that the TPO was in effect at the time of the meeting. Davis v. Wallace, 310 Ga. App. 340, 713 S.E.2d 446 (2011).

Directed verdict was precluded in action against hospital and physician for false imprisonment, etc.

In an action alleging false arrest, malicious prosecution, and false imprisonment, as the arresting officers were parties, not disinterested witnesses. their deposition testimony that the arrest of both plaintiffs was based solely upon their professional judgment, constituted a mere statement of self-serving opinion and a legal conclusion that could not support the grant of summary judgment; moreover, a jury, not a judge, was to construe the facts upon which such opinion was based and could reach a diametrically different conclusion to that reached by the witness. Adams v. Carlisle, 278 Ga. App. 777, 630 S.E.2d 529 (2006).

Officer arresting restaurant invitee. — Summary judgment was properly granted to a police officer on a restaurant invitee's false imprisonment claim under O.C.G.A. § 51-7-20. The officer, who was told by the restaurant manager that the invitee refused an order to leave the premises, had probable cause to arrest the invitee without a warrant for criminal trespass under O.C.G.A. § 16-7-21. Kline v. KDB, Inc., 295 Ga. App. 789, 673 S.E.2d 516 (2009).

Official immunity did not apply. — Under respondeat superior, a principal had no defense based on an agent's immunity from civil liability for an act committed in the course of employment; thus, because the official immunity of a public employee did not protect a governmental entity from liability under respondeat superior, a trial court's summary judgment for a city based on allegations of false arrest was improper, despite the fact that the officers carrying out the arrest were immune. Rodriguez v. Kraus, 275 Ga. App. 118, 619 S.E.2d 800 (2005).

Deputy did not show entitlement to official immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) as to the claims of false arrest and malicious prosecution because plaintiff offered evidence tending to show that the deputy violated Ga.

Const. 1983, Art. I, Sec. I, Para. XXIII and O.C.G.A. § 51-7-20; thus, there were material fact issues precluding summary judgment. Jordan v. Mosley, 487 F.3d 1350 (11th Cir. 2007).

51-7-21. Effect of good faith on liability for imprisonment under warrant.

JUDICIAL DECISIONS

Section does not apply if warrant invalid. — In a 42 U.S.C. § 1983 suit filed by a Florida businesswoman alleging false arrest based upon the plaintiff giving postdated checks to a Georgia payee, issues of fact remained with respect to the businesswoman's false imprisonment/false arrest claims under O.C.G.A. § 51-7-20 against a Georgia sheriff's deputy and the payee; the defense in O.C.G.A. § 51-7-21 did not apply because the Georgia arrest warrant was invalid, and the safe harbor provision in O.C.G.A. § 16-9-20(h)(2) had no relevance to the good cause inquiry under O.C.G.A. § 51-7-21. Brown v. Camden County, 583 F. Supp. 2d 1358 (S.D. Ga. 2008).

ARTICLE 3

MALICIOUS PROSECUTION

Law reviews. — For annual survey on law of torts, see 61 Mercer L. Rev. 335 (2009).

51-7-40. Right of action for malicious prosecution.

JUDICIAL DECISIONS

Analysis

General Consideration
Application to Specific Cases

General Consideration

Showing of malice necessary for malicious prosecution.

Defendants' reliance on the bare allegations of the payee's affidavit without taking any steps to verify the information in it created a fact issue for the jury about whether the defendants' acts were wanton or were done with a reckless disregard for or a conscious indifference to the rights of the plaintiff, and thus, whether defendants acted with the malice necessary to support a malicious prosecution action. McClelland v. Courson's 441 South Station, Inc., 248 Ga. App. 170, 546 S.E.2d 300 (2001).

Instigation of prosecution.

Magistrate's order requiring the plaintiff to attend the warrant application hearing was not a "summons" as that term was understood in the malicious prosecution context. Renton v. Watson, 319 Ga. App. 896, 739 S.E.2d 19 (2013).

Official immunity. — Trial court erred in denying a police officer summary judgment as to the arrestees' malicious prosecution claim because that claim was barred by official immunity when the officer's actions against the arrestees did not show malice but were an effort to restrain the arrestees and control an uncertain situation; one of the arrestees approached the officer and began arguing with the officer while the officer was speaking to a suspect in custody, and when arrestee reached into the truck to retrieve her

purse, the officer was concerned for the officer's safety. Valades v. Uslu, 301 Ga. App. 885, 689 S.E.2d 338 (2009), cert. denied, No. S10C0803, 2010 Ga. LEXIS 519 (Ga. 2010).

Police detective was entitled to qualified immunity in a teacher's suit against the detective for malicious prosecution after the detective investigated the teacher and arrested the teacher for child molestation following complaints from three 10-year-old students that the teacher was asking to touch the students, touching the students, and asking the students not to say anything about the actions. Marshall v. Browning, 310 Ga. App. 64, 712 S.E.2d 71 (2011).

Malicious prosecution, false arrest, and false imprisonment are not mutually exclusive, and a plaintiff can proceed before a jury on all three theories. Wal-Mart Stores, Inc. v. Johnson, 249 Ga. App. 84, 547 S.E.2d 320 (2001), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

Officer's independent judgment in making arrest.

In an action alleging false arrest, malicious prosecution, and false imprisonment, as the arresting officers were parties, not disinterested witnesses. their deposition testimony that the arrest of both plaintiffs was based solely upon their professional judgment, constituted a mere statement of self-serving opinion and a legal conclusion that could not support the grant of summary judgment; moreover, a jury, not a judge, was to construe the facts upon which such opinion was based and could reach a diametrically different conclusion to that reached by the witness. Adams v. Carlisle, 278 Ga. App. 777, 630 S.E.2d 529 (2006).

Existence of probable cause, etc.

Trial court did not err in granting summary judgment to property owner on priest's malicious prosecution claim, as probable cause existed to prosecute the priest since a police officer saw the priest violate a restraining order by committing a criminal trespass and by threatening another person; probable cause also existed because the two restraining order violations arose out of the same incident and were reasonably related even though the criminal charge for aggravated stalking arising out of the threat's made to the property owner's employee was later merged into another offense. Holmes v. Achor Ctr., Inc., 260 Ga. App. 882, 581 S.E.2d 390 (2003).

Sufficiency of complaint.

Injured party was not able to recover under O.C.G.A. § 51-1-6 for the declarant's alleged violation of the criminal statutes O.C.G.A. § 16-10-26, prohibiting giving a false report of a crime, and O.C.G.A. § 16-10-24, prohibiting obstructing or hindering the police, as these statutes did not provide for a civil cause of action; furthermore, the legislature had provided statutory civil remedies in the form of false arrest under O.C.G.A. § 51-7-1 and malicious prosecution under O.C.G.A. § 51-7-40. Jastram v. Williams, 276 Ga. App. 475, 623 S.E.2d 686 (2005).

In a case brought under 42 U.S.C. § 1983, a former employee's malicious prosecution claim failed since the complaint did not allege either the existence of any criminal proceedings, or a termination of such proceedings in the employee's favor, both of which were elements for a malicious prosecution claim under O.C.G.A. § 51-7-40. Boyd v. Peet, 249 Fed. Appx. 155 (11th Cir. 2007) (Unpublished).

Burden of proof.

Plaintiff could not sustain claims of false arrest and malicious prosecution against a police officer and city because there was no evidence of lack of probable cause or malice. Stanford v. City of Manchester, 246 Ga. App. 129, 539 S.E.2d 845 (2000).

Cited in Desmond v. Troncalli Mitsubishi, 243 Ga. App. 71, 532 S.E.2d 463 (2000); Fleming v. U-Haul Co. of Ga., 246 Ga. App. 681, 541 S.E.2d 75 (2000); Sherrill v. Stockel, 252 Ga. App. 276, 557 S.E.2d 8 (2001).

Application to Specific Cases

Malice required for malicious prosecution action. — Judgment on claim of forgery was reversed because defendant's reliance on the bare allegations of the affidavit of the payee on the check without taking any steps to verify the information in it created a fact issue for the jury about whether the defendants' acts were wanton

or were done with a reckless disregard for or a conscious indifference to the rights of the plaintiff, and thus, whether defendants acted with the malice necessary to support a malicious prosecution action. McClelland v. Courson's 441 South Station, Inc., 248 Ga. App. 170, 546 S.E.2d 300 (2001).

Claim not barred by judicial estoppel. — Employee's malicious prosecution claim was not barred by judicial estoppel as the claim was not viable until after the employee filed a Chapter 7 bankruptcy petition; the employee was not required under 11 U.S.C. § 541(a)(7) to amend the petition to reflect the malicious prosecution claim. Vojnovic v. Brants, 272 Ga. App. 475, 612 S.E.2d 621 (2005).

Lack of probable cause. — A contractor accused a property owner of theft by deception by falsely asserting that the owner refused to pay for a fence; the owner was arrested, but the charges were later dropped. That the magistrate found probable cause to issue the arrest warrant was not a defense, as the magistrate was not disinterested; the magistrate had several ex parte meetings with and gave legal advice to the contractor, and assisted the contractor in using the threat of criminal prosecution in an attempt to coerce the owner into paying the disputed portion of the bill. Gooch v. Tudor, 296 Ga. App. 414, 674 S.E.2d 331 (2009).

As a contractor's dispute with a homeowner over a bill for building a fence was a civil matter, and the Georgia Constitution prohibits imprisonment for debt, a magistrate lacked probable cause to issue a warrant to arrest the homeowner for theft by deception. Gooch v. Tudor, 296 Ga. App. 414, 674 S.E.2d 331 (2009).

Tenant's reentry into vacated premises. — Because tenant ceased to be a tenant upon vacating the premises before the rental term ended, tenant's attempted reentry was a criminal trespass which constituted probable cause for the landlord to swear out a warrant against the tenant, and therefore summary judgment for the landlord was proper. Erfani v. Bishop, 251 Ga. App. 20, 553 S.E.2d 326 (2001).

Action involving criminal trespass. — In light of their understanding of prior litigation, defendants reasonably believed that plaintiff was guilty of criminal trespass. Holmes v. Achor Ctr., Inc., 242 Ga. App. 887, 531 S.E.2d 773 (2000).

Defendant did not instigate prosecution of plaintiff. — Evidence did not establish that the defendant instigated a criminal prosecution of the plaintiff since the prosecution of the plaintiff began, not with the provision of any information to the authorities by the defendant, but by happenstance during an ongoing investigation into abuse of surplus government property, and the defendant only denied involvement in any alteration of certain documents which created an inference that the plaintiff had committed forgery. Kaiser v. Tara Ford, Inc., 248 Ga. App. 481, 546 S.E.2d 861 (2001).

Agent's liability.

In a malicious prosecution case brought against a medical professional company and the company's owning doctor by the company's former office manager and a former part-time worker after those former employees were charged with theft and fraud but the charges were dismissed, the trial court erred by granting the company summary judgment since there existed genuine issues of material fact as to whether a new chief operating officer hired for the company, and an agent for the company, had misrepresented the officer's knowledge that the part-time worker had been re-hired by the company to work on an office manual and paid accordingly. However, there existed no evidence that the owning doctor made any knowing misrepresentations to the investigating detective since the owning doctor had no knowledge that the part-time worker had been rehired at any time. Barnette v. Coastal Hematology & Oncology, P. C., 294 Ga. App. 733, 670 S.E.2d 217 (2008).

Action arising from passing of bad check. — Trial court erred in granting summary judgment to defendants because a factual issue remained as to whether they maliciously prosecuted plaintiff based on evidence showing that plaintiff went to defendants with documents which indicated that plaintiff did not write the dishonored check and that the return of a certified letter had indicated the address

to which it was sent was not plaintiff's home. Joseph v. Home Depot, Inc., 246 Ga. App. 868, 542 S.E.2d 618 (2000).

Dismissal of delinquency petition. Trial court properly denied the employer's motion for directed verdict as to a malicious prosecution claim because the employee showed that the employer authorized the employee to write checks to the employee and then reported the money stolen, the employer manufactured and post-dated documents to erroneously show that employee wrote checks in violation of company policy and that the employee was not authorized to use a credit card, and the employer hired investigators to inquire about the alleged theft, who then contacted the police and provided the fabricated documents. Vojnovic v. Brants, 272 Ga. App. 475, 612 S.E.2d 621 (2005).

Evidence established malice and lack of probable cause. — In an attempt to pressure a property owner into paying the disputed portion of a bill, a contractor accused the owner of theft by deception by falsely asserting that the owner refused to pay for a fence; the owner was arrested, but the charges were later dropped. As the contractor acted with malice and lacked probable cause to initiate criminal proceedings, the owner properly prevailed on a malicious prosecution claim. Gooch v. Tudor, 296 Ga. App. 414, 674 S.E.2d 331 (2009).

Conduct supported punitive damages award. — A contractor's using the threat of criminal prosecution in an attempt to pressure a property owner into paying a disputed bill, which resulted in the owner's being arrested and jailed, supported an award of punitive damages under O.C.G.A. § 51-12-5.1(b). Gooch v. Tudor, 296 Ga. App. 414, 674 S.E.2d 331 (2009).

Employee action alleging malicious prosecution. — Trial court erred in granting summary judgment in favor of a corporation and the corporation's president in an employee's action alleging malicious prosecution and malicious arrest because genuine issues of fact remained as to the issues of probable cause and malice; although the president averred that the president did not know that the employee was not licensed when the president hired the employee, the affidavits the employee submitted indicated otherwise. McKissick v. S. O. A., Inc., 299 Ga. App. 772, 684 S.E.2d 24 (2009).

Neighbors liable for intentional infliction of emotional distress and malicious prosecution. — Homeowner's judgments against her neighbors for malicious prosecution and intentional infliction of emotional distress did not constitute a double recovery because separate conduct supported the emotional distress claim including the neighbors gathering outside the homeowner's home to celebrate the homeowner's arrest and publicly humiliate the homeowner in front of the homeowner's spouse and children. Turnage v. Kasper, 307 Ga. App. 172, 704 S.E.2d 842 (2010).

Trial court's findings upheld on appeal. — A trial court's findings in favor of a customer on the customer's counterclaim for malicious prosecution in a contractor's breach of contract and trover claim were upheld as the evidence established that the contractor had signed a sworn affidavit stating that the customer committed criminal fraud by not paying for an installed fence on the customer's property and refused to pay when the amount due was merely in dispute and the customer had, in fact, tendered a check for a portion of the amount due indicating that the remaining balance was in dispute. The fact that the contractor's execution of those false statements had consequences not intended, namely that the customer spent two nights in jail, was insufficient to absolve the contractor's liability for making them. Gooch v. Tudor, 296 Ga. App. 414, 674 S.E.2d 331 (2009).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 1 Am. Jur. Pleading and Practice Forms, Abuse of Process, § 2. 17 Am. Jur. Pleading and Practice Forms, Malicious Prosecution, § 3.

51-7-41. Accrual of right of action.

JUDICIAL DECISIONS

Statute of limitations.

Arrestees' malicious prosecution claim was timely because it did not accrue until September 27, 2006, the date that the arrestees were acquitted of obstruction charges, and the arrestees filed their complaint on August 31, 2007. Valades v. Uslu, 301 Ga. App. 885, 689 S.E.2d 338 (2009), cert. denied, No. S10C0803, 2010 Ga. LEXIS 519 (Ga. 2010).

51-7-42. Inquiry before committing court or magistrate as prosecution.

JUDICIAL DECISIONS

Inquiry defined.

Attorney's 42 U.S.C. § 1983 malicious prosecution claim against a police officer failed because the attorney was unable to show that the attorney's U.S. Const., amend. 4 rights were violated because the attorney was freed on bail immediately after appearing before a magistrate judge on the day following the attorney's arrest, which was warrantless and therefore did not constitute legal process or an inquiry under O.C.G.A. § 51-7-42. Love v. Oliver, 450 F. Supp. 2d 1336 (N.D. Ga. 2006).

Cited in Jones v. Warner, 301 Ga. App. 39, 686 S.E.2d 835 (2009).

51-7-43. Lack of probable cause defined; question for jury.

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability to Specific Cases

General Consideration

Summary judgment improper. — Trial court erred in granting summary judgment to a police officer in an arrestee's action alleging malicious prosecution because (1) a question of fact remained as to whether the officer had probable cause to charge the arrestee with disorderly conduct; (2) the charge against the arrestee was pending for well over a year before the case was called in magistrate court; and (3) the fact that the party that first brought the charges later moved to dismiss them and that the trial court granted the motion did not alter the conclusion that for purposes of O.C.G.A. § 51-7-43, a "prosecution" occurred. Jones v. Warner, 301 Ga. App. 39, 686 S.E.2d 835 (2009).

Cited in Fleming v. U-Haul Co. of Ga., 246 Ga. App. 681, 541 S.E.2d 75 (2000).

Applicability to Specific Cases

Employer's fraud. — While an employee's motion for directed verdict at a related criminal trial was denied, a jury could reasonably find that ruling was obtained by the fraud of the employer and the employee's supervisors who concealed

exculpatory evidence resulting in a lack of probable cause for the employee's prosecution could be found. Wolf Camera, Inc. v. Royter, 253 Ga. App. 254, 558 S.E.2d 797 (2002).

Detective believed children's testimony over teacher's testimony. — Police detective was entitled to qualified immunity in a teacher's suit against the detective for malicious prosecution after the detective investigated the teacher and arrested the teacher for child molestation following complaints from three 10-year-old students that the teacher was asking to touch the children, touching the children, and asking the children not to say anything about the actions. Marshall v. Browning, 310 Ga. App. 64, 712 S.E.2d 71 (2011).

Trial court's findings upheld on appeal. — A trial court's findings in favor of a customer on the customer's counterclaim for malicious prosecution in a contractor's breach of contract and trover claim were upheld as the evidence established that the contractor had signed a sworn affidavit stating that the customer committed criminal fraud by not paying for an installed fence on the customer's property and refused to pay when the amount due was merely in dispute and the customer had, in fact, tendered a check for a portion of the amount due indicating that the remaining balance was in dispute. The fact that the contractor's execution of those false statements had consequences not intended, namely that the customer spent two nights in jail, was insufficient to absolve the contractor's liability for making them. Gooch v. Tudor, 296 Ga. App. 414, 674 S.E.2d 331 (2009).

51-7-44. Inference of malice from lack of probable cause; rebuttal of inference.

JUDICIAL DECISIONS

Malice may be inferred from want of probable cause.

In an action regarding the malicious prosecution of an employee for theft, the jury could infer malice from the lack of probable cause for the employee's prosecution shown by the employer's and supervisors' concealment of exculpatory evidence. Wolf Camera, Inc. v. Royter, 253 Ga. App. 254, 558 S.E.2d 797 (2002).

Agent failed to conduct reasonable inquiry. — In a malicious prosecution case brought against a medical professional company and the company's owning doctor by the company's former office manager and a former part-time worker after those former employees were charged with theft and fraud but the charges were dismissed, the trial court erred by granting the company summary judgment since there existed genuine issues of material fact as to whether a new chief operating officer hired for the company, and an agent for the company, had misrepresented the officer's knowledge that the part-time worker had been re-hired by the company to work on an office manual and paid accordingly. However, there existed no evidence that the owning doctor made any knowing misrepresentations to the investigating detective since the owning doctor had no knowledge that the part-time worker had been rehired at any time. Barnette v. Coastal Hematology & Oncology, P. C., 294 Ga. App. 733, 670 S.E.2d 217 (2008).

ARTICLE 4

DETENTION OR ARREST ON SUSPICION OF SHOPLIFTING OR FILM PIRACY

51-7-60. Preclusion of recovery for detention or arrest of person suspected of shoplifting under certain circumstances.

JUDICIAL DECISIONS

Summary judgment inappropriate. Summary judgment was properly denied on a parent's false imprisonment claim under O.C.G.A. § 51-7-20 arising out of an accusation by store employees that the parent's nine-year-old child stole from the store because whether the child's detention was justified by the employees' reasonable belief that the child was shoplifting under O.C.G.A. § 51-7-60 was a jury question; the actions relied upon by the employees were, for the most part, not the result of the child's suspicious actions or behavior, and whether they acted with reasonable prudence was a matter for the jury to decide. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

51-7-62. Actions for false arrest and false imprisonment for individuals suspected of film piracy.

Whenever the owner, operator, or lessee of a motion picture exhibition facility or any agent or employee of the owner, operator, or lessee detains, arrests, or causes to be detained or arrested any person reasonably thought to be engaged in film piracy in violation of Code Section 16-8-62 and, as a result of the detention or arrest, the person so detained or arrested brings an action for false arrest or false imprisonment against the owner, operator, lessee, agent, or employee, no recovery shall be had by the plaintiff in such action where it is established by competent evidence:

(1) That the plaintiff had so conducted himself or herself or behaved in such manner as to cause a person of reasonable prudence to believe that the plaintiff, at or immediately prior to the time of the detention or arrest, was committing the offense of film piracy, as defined by Code Section 16-8-62; or

(2) That the manner of the detention or arrest and the length of time during which such plaintiff was detained was under all the circumstances reasonable. (Code 1981, § 51-7-62, enacted by Ga. L. 2004, p. 341, § 2.)

Effective date. — This Code section became effective July 1, 2004.

ARTICLE 5

ABUSIVE LITIGATION

51-7-80. Definitions.

Law reviews. — For annual survey article discussing trial practice and procedure, see 52 Mercer L. Rev. 447 (2000). For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

JUDICIAL DECISIONS

Malice not established. — Trial court did not err in granting judgment in favor of a company on a debtor's abusive litigation claim because the debtor failed to present any evidence that the company pursued the company's claim against the debtor to recover the amount due on a loan with malice pursuant to O.C.G.A. § 51-7-80(5). Sevostiyanova v. Tempest Recovery Servs., 307 Ga. App. 868, 705 S.E.2d 878 (2011).

Notice required prior to suit. — Where a construction company's counterclaims alleging abusive litigation under O.C.G.A. §§ 9-15-14 and 51-7-80 et seq., alleged in the pleading that the claims constituted "notice" to assert such claims under O.C.G.A. § 51-7-81, the trial court properly determined that they were not counterclaims and, accordingly, dismissed them for want of subject matter jurisdiction under O.C.G.A. § 9-11-12(h)(3); it was also found that the required notice provided in O.C.G.A. § 51-7-84(b) was not provided prior to the filing of a claim, nor was the prior litigation ended in defendants' favor, both of which were requirements in order to bring such a claim, and disposing of the claim under a summary judgment analysis, pursuant to O.C.G.A. § 9-11-56, was proper. Langley v. Nat'l Labor Group, Inc., 262 Ga. App. 749, 586 S.E.2d 418 (2003).

Abusive litigation not found.

Because the Court of Appeals of Georgia merely found in a prior action between the parties that an employer failed to prove its claims against its former employee at trial, and that holding did not amount to a binding determination that those claims were without substantial justification or that the employer engaged in abusive litigation, the trial court properly granted summary judgment to the employer as to the former employee's abusive litigation claims; moreover, although questions of reasonableness were generally for the jury, given that the employer was successful at every stage of the litigation prior to the appeal, the trial court was authorized to determine as a matter of law that the company acted in good faith in filing and pursuing its claims. Bacon v. Volvo Serv. Ctr., Inc., 288 Ga. App. 399, 654 S.E.2d 225 (2007).

Strategic lawsuits against public participation. — There is no requirement that a party first seek to invoke O.C.G.A. § 9-15-14 or O.C.G.A. § 51-7-80 before seeking the protections of O.C.G.A. § 9-11-11.1. Hagemann v. City of Marietta, 287 Ga. App. 1, 650 S.E.2d 363 (2007), cert. denied, 2008 Ga. LEXIS 128 (Ga. 2008).

Award of attorney's fees premature. — An award of attorney fees to the purchaser of building supplies in a supplier's action to recover sums allegedly due for the supplies was in error because the underlying litigation had not yet been concluded when the attorney fee award was made. Cox Interior, Inc. v. Bayland Props., LLC, 293 Ga. App. 612, 667 S.E.2d 452 (2008).

Claim not "without substantial justification." — Trial court did not err in granting a realty company's motion to dismiss a limited liability company's (LLC) complaint for abusive litigation because it could not establish that a realty company acted without substantial justification as required by O.C.G.A. § 51-7-81; the realty company's failure to withdraw the notices of lis pendens based

upon the non-final dismissal of its clients' specific performance claim did not demonstrate that it continued the notices of lis pendens without substantial justification. Petroleum Realty II v. Morris, Manning & Martin, 317 Ga. App. 102, 728 S.E.2d 896 (2012).

Cited in Land v. Boone, 265 Ga. App. 551, 594 S.E.2d 741 (2004); Fortson v. Hotard, 299 Ga. App. 800, 684 S.E.2d 18 (2009).

51-7-81. Liability for abusive litigation.

Law reviews. — For article, "Of Frivolous Litigation and Runaway Juries: A View from the Bench," see 41 Ga. L. Rev. 431 (2007).

JUDICIAL DECISIONS

Notice required prior to suit. — Where a construction company's counterclaims alleging abusive litigation under O.C.G.A. §§ 9-15-14 and 51-7-80 et seq., alleged in the pleading that the claims constituted "notice" to assert such claims under O.C.G.A. § 51-7-81, the trial court properly determined that they were not counterclaims and, accordingly, dismissed them for want of subject matter jurisdiction under O.C.G.A. § 9-11-12(h)(3); it was also found that the required notice provided in O.C.G.A. § 51-7-84(b) was not provided prior to the filing of a claim, nor was the prior litigation ended in defendants' favor, both of which were requirements in order to bring such a claim, and disposing of the claim under a summary judgment analysis, pursuant to O.C.G.A. § 9-11-56, was proper. Langley v. Nat'l Labor Group, Inc., 262 Ga. App. 749, 586 S.E.2d 418 (2003).

Stated purpose of O.C.G.A. § 51-7-84 is to give the prospective defendant to an abusive litigation claim an opportunity to voluntarily withdraw the complaint. Even if a notice given in an earlier case complied with § 51-7-84, that notice cannot satisfy the notice requirement in a later case because the plaintiff is not given the opportunity to withdraw the complaint in the later action. Baylis v. Daryani, 294 Ga. App. 729, 669 S.E.2d 674 (2008).

Defendants' counterclaim against a business owner alleged abusive litigation in violation of O.C.G.A. § 51-7-80 et seq. Since the counterclaim did not comply with the notice provisions of O.C.G.A. § 51-7-84 and despite the fact that the defendants gave the owner such notice in a prior action between the parties this could not constitute compliance with § 51-7-84, and therefore the counterclaim had to be dismissed. Baylis v. Daryani, 294 Ga. App. 729, 669 S.E.2d 674 (2008).

Trial court did not err in granting judgment in favor of a company on a debtor's abusive litigation claim because the debtor did not provide the company with the requisite advance notice of the debtor's abusive litigation claim; O.C.G.A. § 51-7-84(a) specifically requires notice to the opposing party as a condition precedent to any claim for abusive litigation so that the party will have the opportunity to voluntarily discontinue the proceeding at issue. Sevostiyanova v. Tempest Recovery Servs., 307 Ga. App. 868, 705 S.E.2d 878 (2011).

Claim not timely brought. — Creditor's motion to amend its claim for sanctions against debtor under O.C.G.A. § 9-15-14 (2005) to state a claim under O.C.G.A. § 51-7-81 (2005) was denied, as the amendment was untimely and inequitable, being filed two years after debtor had been granted a discharge and the time for filing claims had long since passed. In re Fowler, No. 03-92256-MGD, 2006 Bankr. LEXIS 2322 (Bankr. N.D. Ga. July 10, 2006).

Claim not "without substantial justification."

Trial court did not err in granting a realty company's motion to dismiss a limited liability company's (LLC) complaint for abusive litigation because it could not establish that a realty company acted

without substantial justification as required by O.C.G.A. § 51-7-81; the realty company's failure to withdraw the notices of lis pendens based upon the non-final dismissal of its clients' specific performance claim did not demonstrate that it continued the notices of lis pendens without substantial justification. Petroleum Realty II v. Morris, Manning & Martin, 317 Ga. App. 102, 728 S.E.2d 896 (2012).

Malice not established in pursuing debtor. — Trial court did not err in granting judgment in favor of a company on a debtor's abusive litigation claim because the debtor failed to present any evidence that the company pursued the company's claim against the debtor to recover the amount due on a loan with malice pursuant to O.C.G.A. § 51-7-80(5). Sevostiyanova v. Tempest Recovery Servs., 307 Ga. App. 868, 705 S.E.2d 878 (2011).

Plaintiff, as plaintiff in actions, could not base suit on O.C.G.A. § 51-7-81. — Plaintiff does not allege that defendant attorney took an active part in the initiation, continuation, or procurement of civil proceedings against the plaintiff. Indeed, plaintiff was the plaintiff in the two cases involving these parties — in the case against a contracting party and the instant action involving defendant attorney. Thus, plaintiff has failed to state a claim for abusive litigation. Fortson v. Hotard, 299 Ga. App. 800, 684 S.E.2d 18 (2009).

Summary judgment.

Because the Court of Appeals of Georgia merely found in a prior action between the parties that an employer failed to prove its claims against its former employee at trial, and said holding did not amount to a binding determination that those claims were without substantial justification or that the employer engaged in abusive litigation, the trial court properly granted summary judgment to the employer as to the former employee's abusive litigation claims; moreover, although questions of reasonableness were generally for the jury, given that the employer was successful at every stage of the litigation prior to the appeal, the trial court was authorized to determine as a matter of law that the company acted in good faith in filing and pursuing its claims. Bacon v. Volvo Serv. Ctr., Inc., 288 Ga. App. 399, 654 S.E.2d 225 (2007).

Attorney's fees improper before underlying suit terminated. — Trial court erred in charging a jury on attorney's fees under O.C.G.A. § 51-7-81 because a claim under § 51-7-81 could not be brought as a counterclaim and was premature. The jury awarded fees against both the buyers and buyers' counsel, which was only permitted under § 51-7-81 and not under O.C.G.A. § 13-6-11; because the jury may have based the jury's award on an improper theory, a new trial on attorney's fees was required. Goldsmith v. Peterson, 307 Ga. App. 26, 703 S.E.2d 694 (2010).

51-7-82. Defenses.

JUDICIAL DECISIONS

Complete defense offered to abuse of litigation claim. — Purchaser's abuse of litigation claim was properly dismissed under O.C.G.A. § 9-11-12(b)(6), because the lender's dispossessory claim against the purchaser and seller, the subject of the abuse of litigation claim, succeeded, which was a complete defense under O.C.G.A. § 51-7-82(c). LaSonde v. Chase Mortg. Co., 259 Ga. App. 772, 577 S.E.2d 822 (2003).

Lack of ante-litem notice an affirmative defense. — Abusive litigation statutes are silent as to any requirement that a defense based upon the ante-litem notice be affirmatively pled and proven by a defendant; thus, the legislature never intended to make the lack of ante-litem notice an affirmative defense. Davis v. Wallace, 310 Ga. App. 340, 713 S.E.2d 446 (2011).

Cited in Bacon v. Volvo Serv. Ctr., Inc., 288 Ga. App. 399, 654 S.E.2d 225 (2007).

51-7-83. Measure of damages.

Law reviews. — For article, "Of Frivolous Litigation and Runaway Juries: A View from the Bench," see 41 Ga. L. Rev. 431 (2007).

JUDICIAL DECISIONS

Attorney's fees denied. — Creditor's motion to amend its claim for sanctions against debtor under O.C.G.A. § 9-15-14 (2005) to state a claim under O.C.G.A. § 51-7-81 (2005) was denied, as the amendment was untimely and inequitable, and resolution of the claim under the former section was conclusive. In re Fowler, No. 03-92256-MGD, 2006 Bankr. LEXIS 2322 (Bankr. N.D. Ga. July 10, 2006).

Attorney's fees improper before underlying suit terminated. — Trial court erred in charging a jury on attorney's fees under O.C.G.A. § 51-7-81 because a claim under § 51-7-81 could not be brought as a counterclaim and was premature. The jury awarded fees against both the buyers and buyers' counsel, which was only permitted under § 51-7-81 and not under O.C.G.A. § 13-6-11; because the jury may have based the jury's award on an improper theory, a new trial on attorney's fees was required. Goldsmith v. Peterson, 307 Ga. App. 26, 703 S.E.2d 694 (2010).

51-7-84. Notice of claim asserted; when action must be brought.

Law reviews. — For annual survey article on legal ethics, see 52 Mercer L. Rev. 323 (2000). For survey article on wills, trusts, guardianships, and fiduciary administration for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003). For survey article on local government law, see 60 Mercer L. Rev. 263 (2008). For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

JUDICIAL DECISIONS

Failure to give notice.

Purchaser's abuse of litigation claim against the lender was properly dismissed under O.C.G.A. § 9-11-12(b)(6), because the purchaser failed to give written notice to the lender as was required by O.C.G.A. § 51-7-84(a). LaSonde v. Chase Mortg. Co., 259 Ga. App. 772, 577 S.E.2d 822 (2003).

Where a construction company's counterclaims alleging abusive litigation under O.C.G.A. §§ 9-15-14 and 51-7-80 et seq., alleged in the pleading that the claims constituted "notice" to assert such claims under O.C.G.A. § 51-7-81, the trial court properly determined that they were not counterclaims and, accordingly, dismissed them for want of subject matter jurisdiction under O.C.G.A. § 9-11-12(h)(3); it was also found that the required notice provided in O.C.G.A. § 51-7-84(b) was not provided prior to the filing of a claim, nor was the prior litigation ended in defendants' favor, both of which were requirements in order to bring such a claim, and disposing of the claim under a summary judgment analysis, pursuant to O.C.G.A. § 9-11-56, was proper. Langley v. Nat'l Labor Group, Inc., 262 Ga. App. 749, 586 S.E.2d 418 (2003).

The trial court properly dismissed tenants' tort claims based on their failure to comply with the notice requirements of O.C.G.A. § 51-7-84, applying to parties alleging abusive litigation; the tenants could not avoid the notice requirements merely by characterizing their claims arising from an allegedly abusive lawsuit as conspiracy, perjury, forgery, or theft. Slone v. Myers, 288 Ga. App. 8, 653 S.E.2d 323 (2007), cert. denied, 555 U.S. 881, 129 S. Ct. 196, 172 L.Ed.2d 140 (2008).

Stated purpose of O.C.G.A. § 51-7-84 is to give the prospective defendant to an abusive litigation claim an opportunity to voluntarily withdraw the complaint. Even

if a notice given in an earlier case complied with § 51-7-84, that notice cannot satisfy the notice requirement in a later case because the plaintiff is not given the opportunity to withdraw the complaint in the later action. Baylis v. Daryani, 294 Ga. App. 729, 669 S.E.2d 674 (2008).

Defendants' counterclaim against a business owner alleged abusive litigation in violation of O.C.G.A. § 51-7-80 et seq. Since the counterclaim did not comply with the notice provisions of O.C.G.A. § 51-7-84 and despite the fact that the defendants gave the owner such notice in a prior action between the parties this could not constitute compliance with § 51-7-84, and therefore the counterclaim had to be dismissed. Baylis v. Daryani, 294 Ga. App. 729, 669 S.E.2d 674 (2008).

Trial court did not err in granting judgment in favor of a company on a debtor's abusive litigation claim because the debtor did not provide the company with the requisite advance notice of the debtor's abusive litigation claim; O.C.G.A. § 51-7-84(a) specifically requires notice to the opposing party as a condition precedent to any claim for abusive litigation so that the party will have the opportunity to voluntarily discontinue the proceeding at issue. Sevostiyanova v. Tempest Recovery Servs., 307 Ga. App. 868, 705 S.E.2d 878 (2011).

O.C.G.A. § 51-7-82(a) had no application because a photographer never supplied an ante-litem notice and city council members, an assistant chief of police, and a law firm never voluntarily withdrew, abandoned, discontinued, or dismissed any action against the photographer, and they were entitled to point to the photographer's failure to comply with O.C.G.A. § 51-7-84 in defending against the photographer's claims; the statutory framework does not prohibit the assertion of a defense based upon the lack of ante-litem notice in an abusive litigation case alleging interference with property and special damages, but to the contrary, the notice requirement is expressly made a condition precedent in every claim for abusive litigation, O.C.G.A. § 51-7-84. Davis v. Wallace, 310 Ga. App. 340, 713 S.E.2d 446 (2011).

Abusive litigation statutes are silent as to any requirement that a defense based upon the ante-litem notice be affirmatively pled and proven by a defendant; thus, the legislature never intended to make the lack of ante-litem notice an affirmative defense. Davis v. Wallace, 310 Ga. App. 340, 713 S.E.2d 446 (2011).

City council members, an assistant chief of police, and a law firm, did not waive the members right to an ante-litem notice defense to a photographer's abusive litigation claims by failing to raise the issue as an affirmative defense in a timely responsive pleading because O.C.G.A. § 51-7-84(a) expressly described the notice as a "condition precedent" to an abusive litigation claim, which placed the burden upon the photographer to provide such notice in order to assert the claims; although a defendant may point to the absence of notice in defending an abusive litigation claim, nothing in the statutory framework makes this an affirmative defense that must be pled in a responsive pleading or waived. Davis v. Wallace, 310 Ga. App. 340, 713 S.E.2d 446 (2011).

Premature claim.

A declaratory judgment suit did not constitute abusive litigation under O.C.G.A. § 51-7-84(b) because the action had not terminated. Hagemann v. City of Marietta, 287 Ga. App. 1, 650 S.E.2d 363 (2007), cert. denied, 2008 Ga. LEXIS 128 (Ga. 2008).

An award of attorney fees to the purchaser of building supplies in a supplier's action to recover sums allegedly due for the supplies was in error because the underlying litigation had not yet been concluded when the attorney fee award was made. Cox Interior, Inc. v. Bayland Props., LLC, 293 Ga. App. 612, 667 S.E.2d 452 (2008).

Claim not timely brought. — Creditor's motion to amend its claim for sanctions against debtor under O.C.G.A. § 9-15-14 (2005) to state a claim under O.C.G.A. § 51-7-81 (2005) was denied, as the amendment was untimely and inequitable, being filed two years after debtor had been granted a discharge and the time for filing claims had long since passed. In re Fowler, No. 03-92256-MGD, 2006 Bankr. LEXIS 2322 (Bankr. N.D. Ga. July 10, 2006).

Abusive litigation claim dismissed. Parent's claim for abusive litigation, which was brought one year and one day after the litigation that was the subject of the claim was terminated by the appellate court's decision that went unchallenged, was not timely as Georgia statutory law was not met because the claim was not filed within the required one year of the final termination of the earlier proceeding. Wilson v. Hinely, 259 Ga. App. 615, 578 S.E.2d 254 (2003).

Filing of the abusive litigation suit was justified and proper given the absence of any clear authority under Georgia law as to precisely when the statute of limitations commenced, following the dismissal of an anti-SLAPP action, under O.C.G.A § 51-7-84(b). Land v. Boone, 265 Ga. App. 551, 594 S.E.2d 741 (2004).

Cited in Fortson v. Hotard, 299 Ga. App. 800, 684 S.E.2d 18 (2009).

51-7-85. Exclusive remedy.

JUDICIAL DECISIONS

Preemption. — Grant of summary judgment was affirmed because the trial court did not err in holding that the company's claims against the law firm fell within the purview of the abusive litigation statute, should have been brought under that statute, and thus were preempted by the exclusivity provisions of O.C.G.A. § 51-7-85. Meadow Springs Recovery, LLC v. Wofford, 319 Ga. App. 79, 734 S.E.2d 100 (2012).

Cited in Hagemann v. City of Marietta, 287 Ga. App. 1, 650 S.E.2d 363 (2007).

CHAPTER 9

INJURIES TO REAL ESTATE

51-9-1. Cause of action for interference with enjoyment of property.

Law reviews. — For survey article on labor and employment law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 303 (2003). For article, "Timber! - Falling Tree Liability in Georgia," see 10 Ga. St. B.J. 10 (No. 2, 2004).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
APPLICABILITY TO SPECIFIC CASES

General Consideration

No right to carry firearm in place of worship. — Private property owners could forbid the possession of a weapon on the owners' premises, as property law, tort law, and criminal law, such as that later codified in O.C.G.A. §§ 16-7-21(b)(3), 51-3-1, 51-3-2, 51-9-1, provided the canvas on which the Second Amendment was drafted, and illustrated that the basis of the Second Amendment did not include protection for a right to carry a firearm in

a place of worship against the church owner's wishes. GeorgiaCarry.Org, Inc v. Georgia, 687 F.3d 1244 (11th Cir. 2012).

Applicability to Specific Cases

Attempted wrongful foreclosure allegations did not state a claim for trespass under O.C.G.A. § 51-9-1 since the mortgagors did not allege property damage or an entry onto their property resulting from a mortgagee's initiation of foreclosure proceedings; therefore, the four-year limitations period under O.C.G.A. § 9-3-30 did not apply to the mortgagors' attempted wrongful disclosure claim arising from a 2001 foreclosure action, and the claim was time-barred. Hauf v. HomEq Servicing Corp., No. 4:05-CV-109 (CDL), 2007 U.S. Dist. LEXIS 9439 (M.D. Ga. Feb. 9, 2007).

Contractor could have been liable in trespass. — Summary judgment was not warranted on an owner's trespass claim because if the owner produced some evidence that a contractor had notice that a foreclosure was wrongful, then the contractor could have been liable for trespass under O.C.G.A. § 51-9-1. Santiago v. Cauley, No. CV203-099, 2005 U.S. Dist. LEXIS 34768 (S.D. Ga. Dec. 6, 2005).

Evidence of interference with possessory interest required.

In a case in which a car buyer appealed a district court's entry of summary judgment in favor of the lender, the buyer's evidence did not give rise to a civil trespass claim under O.C.G.A. § 51-9-1. There was no showing that the lender interfered with the buyer's right to possession. Goia v. Citifinancial Auto, No. 12-12639, 2012 U.S. App. LEXIS 24825 (11th Cir. Dec. 3, 2012) (Unpublished).

Interference with remainder interest. — In a case in which (1) the United States brought a trespass claim against the resident on property owned by the United States and managed by the National Park Service; (2) the United States moved for a preliminary injunction; (3) O.C.G.A. § 51-9-1 defined trespass broadly; (4) the resident was bound by the restriction in the deed that the resident's right of construction was limited to a single-family residence; (5) the construction that defendant proposed to complete was spatially separate from the resident's house; and (6) the United States alleged that the construction prejudiced its remainder interest, the United States was likely to succeed on its claim for trespass. United States v. Jenkins, 714 F. Supp. 2d 1213 (S.D. Ga. 2008).

Malicious interference with employment contract.

Trial court properly entered a judgment on the pleadings for a corporation on a president's intentional interference with an employment contract claim as the corporation owned a majority interest in a limited liability company employer and was not a stranger to the contract. Tidikis v. Network for Med. Communs. & Research, LLC, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

Trial court properly entered a judgment on the pleadings for a corporation on a president's intentional interference claim as to the president's prospective employment with the prospective buyer of a limited liability company (LLC) as the president failed to show an employment offer from the buyer; the president's claim was predicated on the corporation's termination of the president from a job at the LLC and failed because the corporation was not a stranger to the employment contract. Tidikis v. Network for Med. Communs. & Research, LLC, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

Suit for trespass to realty failed, etc.

There was no basis for a homeowner's trespass claim against a real estate firm and two of the firm's agents. There was no evidence that the agents refused to leave the property after being asked to leave or that the agents interfered with the homeowner's possessory interest in the property. Udoinyion v. Re/Max, 289 Ga. App. 580, 657 S.E.2d 644 (2008), cert. denied, 2008 Ga. LEXIS 481 (Ga. 2008).

Home builder's right to exclude others from property. — A home builder had the right to exclude a home inspector from trespassing on its properties and properly exercised that right by instructing the inspector not to enter its properties. Pope v. Pulte Home Corp., 246 Ga. App. 120, 539 S.E.2d 842 (2000).

Flooding after plugging of underground drainage pipe. — In a suit in-

volving two landowning couples, it was error to grant summary judgment to the second couple on the first couple's nuisance claim after the second couple plugged an underground drainage pipe. Taking an action that diverted excess water onto another's property could constitute a trespass. Merlino v. City of Atlanta, 283 Ga. 186, 657 S.E.2d 859 (2008).

Forcible eviction of tenant may constitute trespass by landlord.

Summary judgment for a lender in an owner's suit claiming that the lender trespassed on the owner's property was proper because the security deed provided that the lender was allowed to take action to preserve its interest in the property in the event of a default on the payments, and the owners admitted they were in default of those payments. Tacon v. Equity One, Inc., 280 Ga. App. 183, 633 S.E.2d 599 (2006).

Neighboring landowners' suit for trespass and negligence. — Trial court properly denied a neighbor's motion for summary judgment and the appellate court reversed the denial of the cross-motion for summary judgment filed by the adjoining landowners in a trespass and negligence suit, because the neighbor purchased property without first obtaining a survey and the adjoining landowners' home was already encroaching upon the neighbor's property by two feet at the time of the purchase; the adjoining landowners were not liable for their predecessor's conduct in building the house and a fence across the property line of the neighbor's predecessor in title, in the absence of evidence that their predecessor was acting as their agent, and were, therefore, entitled to summary judgment. Navajo Constr., Inc. v. Brigham, 271 Ga. App. 128, 608 S.E.2d 732 (2004).

Evidence was sufficient to support a finding that a willful trespass occurred when a neighbor directed the construction of a sewer lateral across an adjacent owner's property to tie into the owner's sewer line when the neighbor knew that the neighbor had neither a written easement nor permission from the owner to do so. LN West Paces Ferry Assocs., LLC v. McDonald, 306 Ga. App. 641, 703 S.E.2d 85 (2010).

Landowners repairing another party's dam. — Landowners' of lakefront property committed trespass when they went onto a corporation's dam and plugged the weakened dam. Bishop Eddie Long Ministries, Inc. v. Dillard, 272 Ga. App. 894, 613 S.E.2d 673 (2005).

Award of $22,000 for trespass during survey not excessive. — In a trespass counterclaim stemming from an unannounced survey by an adjacent land owner, a jury's award of $22,000 properly withstood motions for relief from the judgment because there was evidence to support the verdict and even if the award, which had not been specifically enumerated as general or nominal damages, was awarded as nominal damages, such damages could vary widely in Georgia and were not subject to being set aside based solely on the amount. Wright v. Wilcox, 262 Ga. App. 659, 586 S.E.2d 364 (2003).

Cutting down trees. — The trial court erred in granting a directed verdict in favor of an engineering firm regarding the landowners' claim of trespass resulting from having trees cut from the landowners' property as the landowners' right to the enjoyment of the property was disturbed. Walls v. Moreland Altobelli Assocs., 290 Ga. App. 199, 659 S.E.2d 418 (2008).

Possession of land gave owners the right to sue telephone company for trespass. — Landowners had the right to bring a trespass action against a utility company and the company's subcontractor for laying cable on the landowners' property without permission. Even if there was a deficiency in the landowners' title, their bare possession of the property was sufficient to support their claim pursuant to O.C.G.A. §§ 51-9-2 and 51-9-3. Lee v. Southern Telecom Co., 303 Ga. App. 642, 694 S.E.2d 125 (2010).

Request for lender's representatives to leave not shown. — In a case in which a car buyer appealed a district court's entry of summary judgment in favor of the lender, the buyer's evidence did not give rise to a civil trespass claim under O.C.G.A. § 51-9-1. There was no evidence that the lender's representatives did not leave when requested to do so or that the buyer asked the lender's repre-

sentative to leave. Goia v. Citifinancial Auto, No. 12-12639, 2012 U.S. App. LEXIS 24825 (11th Cir. Dec. 3, 2012) (Unpublished).

Authority of sheriff to invite individuals onto private land. — Trial court improperly granted summary judgment to a television station in a trespass case; it was for the jury to decide whether station personnel reasonably believed that a county sheriff had authority to invite them onto the property in question to report on the execution of a search warrant. Nichols v. Georgia TV Co., 250 Ga. App. 789, 552 S.E.2d 550 (2001).

Arrestee failed to state a trespass claim against arresting officers because the officers were acting within the officers' official capacities at the time of the arrest. Lavassani v. City of Canton, 760 F. Supp. 2d 1346 (N.D. Ga. 2010).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Tortious Interference with Contractual Relationship Involving Sale of Real Estate, 64 POF3d 273.

51-9-2. Recovery of possession of lands; damages.

Law reviews. — For survey article on real property law, see 60 Mercer L. Rev. 345 (2008). For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

JUDICIAL DECISIONS

No possession of public right of way. — When a builder's trucks damaged grass near a curb in front of a landowner's house, and the grass was entirely within a public right of way owned by a county, the landowner did not have standing to sue the builder for trespass based on "possession" of the right of way under O.C.G.A. § 51-9-2; although the landowner could use the right of way in the same manner as other members of the public, the landowner's interest was not such that the landowner could assert that the landowner possessed the right of way to the exclusion of others. Moses v. Traton Corp., 286 Ga. App. 843, 650 S.E.2d 353 (2007), cert. denied, 2007 Ga. LEXIS 743 (Ga. 2007).

Possession of land gave owners the right to sue telephone company for trespass. — Landowners had the right to bring a trespass action against a utility company and the company's subcontractor for laying cable on the landowners' property without permission. Even if there was a deficiency in the landowners' title, their bare possession of the property was sufficient to support their claim pursuant to O.C.G.A. §§ 51-9-2 and 51-9-3. Lee v. Southern Telecom Co., 303 Ga. App. 642, 694 S.E.2d 125 (2010).

51-9-3. Recovery for wrongful interference with possession of land.

JUDICIAL DECISIONS

Compensatory damages awarded for trespass. — Jury was entitled to award a property owner compensatory and punitive damages pursuant to O.C.G.A. §§ 51-9-3 and 51-12-5.1 because a willful trespass occurred when a neighbor directed the construction of a sewer lateral across the owner's property to tie into the owner's sewer line when the neighbor knew that the neighbor had neither a written easement nor permission from the owner to do so. LN West Paces

Ferry Assocs., LLC v. McDonald, 306 Ga. App. 641, 703 S.E.2d 85 (2010).

Possession of land gave owners the right to sue telephone company for trespass. — Landowners had the right to bring a trespass action against a utility company and the company's subcontractor for laying cable on the landowners' property without permission. Even if there was a deficiency in the landowners' title, their bare possession of the property was sufficient to support their claim pursuant to O.C.G.A. §§ 51-9-2 and 51-9-3. Lee v. Southern Telecom Co., 303 Ga. App. 642, 694 S.E.2d 125 (2010).

51-9-4. Action for trespass by person having title.

JUDICIAL DECISIONS

Cited in De Castro v. Durrell, 295 Ga. App. 194, 671 S.E.2d 244 (2008).

51-9-7. Diversion, obstruction, or pollution of stream as trespass.

Law reviews. — For article, "Water Rights, Public Resources, and Private Commodities: Examining the Current and Future Law Governing the Allocation of Georgia Water," see 38 Ga. L. Rev. 1009 (2004). For article, "Special Challenges to Water Markets in Riparian States," see 21 Ga. St. U.L. Rev. 305 (2004).

51-9-8. Interference with underground streams.

Law reviews. — For article, "Water Rights, Public Resources, and Private Commodities: Examining the Current and Future Law Governing the Allocation of Georgia Water," see 38 Ga. L. Rev. 1009 (2004).

51-9-9. Interference with rights of owner above and below surface of property.

JUDICIAL DECISIONS

Construction with Groundwater Use Act. — O.C.G.A. § 51-9-9 and the Groundwater Use Act of 1972, O.C.G.A. § 12-5-90 et seq., can be read in harmony with one another; O.C.G.A. § 51-9-9, as interpreted by the Supreme Court of Georgia, grants a property interest to a real property owner in everything that lies beneath the surface, including groundwater, and the Groundwater Use Act imposes upon that ownership right certain regulatory limits. In re Durango Ga. Paper Co., 336 B.R. 594 (Bankr. S.D. Ga. 2005).

Owner had interest in groundwater. — Based on the clear and unambiguous language of O.C.G.A. § 51-9-9 and Boardman Petroleum, a debtor, as the property owner, had at a minimum, a bona fide claim of ownership to everything that was above and below the debtor's property including the groundwater lying beneath the surface; for the purposes of the Bidding Procedures Order, the debtor had an asset of indeterminate value which was an asset of the bankruptcy estate and could be offered for sale in the manner provided. In re Durango Ga. Paper Co., 336 B.R. 594 (Bankr. S.D. Ga. 2005).

51-9-10. Interference with right of way or right of common.

Law reviews. — For survey article on real property law, see 60 Mercer L. Rev. 345 (2008). For summary review article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

JUDICIAL DECISIONS

Damage to grass on public right of way did not interfere with neighboring landowner's egress or ingress. — When a builder's trucks damaged grass near a curb in front of a landowner's house, and the grass was entirely within a public right of way owned by a county, the landowner did not have standing to sue the builder for trespass based on O.C.G.A. § 51-9-10; the landowner had provided no evidence of interference with the right to ingress and egress over the public right of way, but rather the landowner retained the full enjoyment of the right to come and go over the right of way as the landowner pleased. Moses v. Traton Corp., 286 Ga. App. 843, 650 S.E.2d 353 (2007), cert. denied, 2007 Ga. LEXIS 743 (Ga. 2007).

51-9-11. Slander or libel concerning title to land.

Law reviews. — For annual survey of construction law, see 56 Mercer L. Rev. 109 (2004).

JUDICIAL DECISIONS

Essential elements.

Because a jury had sufficient evidence to infer that a seller, acting in concert with others, slandered the successor's title to its computer software, in violation of O.C.G.A. § 51-9-11, the trial court properly entered judgment in favor of the successor. Compris Techs., Inc. v. Techwerks, Inc., 274 Ga. App. 673, 618 S.E.2d 664 (2005).

No cause of action. — While liens were improperly filed by a supplier, the property owner failed to show that the statements in the lien notices were false; further, the trial court could also have found that the liens were privileged under O.C.G.A. § 51-5-8, and thus, dismissal of the owner's slander of title action was proper. Roofing Supply of Atlanta, Inc. v. Forrest Homes, Inc., 279 Ga. App. 504, 632 S.E.2d 161 (2006).

Summary judgment was properly granted to real property buyers in an action by the sellers, alleging slander of title under O.C.G.A. § 51-9-11 as the sellers failed to assert actionable claims when lis pendens filed against the property were proper and privileged under O.C.G.A. § 51-5-8; further, any failure to remove or properly mark the lis pendens pursuant to O.C.G.A. § 44-14-612 after the sellers voluntarily dismissed the claim did not form the basis of a slander of title claim against the buyers. Exec. Excellence, LLC v. Martin Bros. Invs., LLC, 309 Ga. App. 279, 710 S.E.2d 169 (2011).

Sufficiency of pleading.

Property owner's defamation of title action failed because the owner's conclusory allegations that the owner had fully paid a surveyor's bill for work done, although sworn to, did not, without more, create a material issue of fact regarding the falsity of statements in a surveyor's lien; thus, the owner failed to establish an essential element of defamation of title and summary judgment in favor of the surveyor was appropriate. Simmons v. Futral, 262 Ga. App. 838, 586 S.E.2d 732 (2003).

Allegations insufficient to prove special damages.

Petition which a husband and wife filed against an attorney, seeking $50,000 "for humiliation and embarrassment" they experienced because an attorney initiated a foreclosure action after they refused to

pay a promissory note, did not state a claim for special damages, and the state supreme court held that the trial court properly granted the attorney's motion for summary judgment on the husband and wife's claim alleging slander of title, even though the trial court dismissed the claim on other grounds. Latson v. Boaz, 278 Ga. 113, 598 S.E.2d 485 (2004).

Trial court erred in awarding a limited liability company special and general damages on the company's counterclaim against a mortgage broker for slander of title because, even if the evidence was sufficient to prove that a lien the broker recorded for a claimed brokerage fee over the LLC's real property constituted false and malicious publication of defamatory words against the property, there was a lack of evidence of special damages resulting therefrom; attorney fees the LLC incurred to remove the lien from the property did not constitute special damages, an essential element necessary to sustain the action, and general evidence that the lien hindered the LLC's ability to obtain a loan was also insufficient to establish special damages. M&M Mortg. Co. v. Grantville Mill, LLC, 302 Ga. App. 46, 690 S.E.2d 630 (2010).

Directed verdict granted. — Manufacturer was entitled to a directed verdict on the customer's slander of title claim since the customer failed to point to any evidence that the manufacturer acted with malice in filing a lien notice to protect its rights to recover the contract balance and failed to show that the lien notice was inaccurate. Premier Cabinets, Inc. v. Bulat, 261 Ga. App. 578, 583 S.E.2d 235 (2003).

Fact issues remaining prevent award of summary judgment. — Where fact issues remained as to a foreclosure allegedly resulting from a non-existent debt, thus slandering the title to the underlying property, summary judgment was reversed. Boaz v. Latson, 260 Ga. App. 752, 580 S.E.2d 572 (2003).

Jury instructions. — In Georgia, there is no tort for the wrongful filing of a claim of materialman's or mechanic's lien. Where a materialman's or mechanic's lien is improperly filed, the cause of action, if any, is for defamation concerning land under O.C.G.A. § 51-9-11. In order to sustain an action of this kind, the plaintiff must allege and prove the uttering and publishing of the slanderous words; that they were false; that they were malicious; that plaintiff sustained special damage thereby; and that plaintiff possessed an estate in the property slandered. Consequently, the court erred in instructing the jury that failure to provide the property owner with statutory notice renders the lien claimant liable for damages. Amador v. Thomas, 259 Ga. App. 835, 578 S.E.2d 537 (2003).

Cited in Sanders v. Brown, 257 Ga. App. 566, 571 S.E.2d 532 (2002).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Proof of Slander or Disparagement of Title to Real Property, 55 POF3d 509.

Am. Jur. Trials. — Slander of Title by Improper Recording of Notice of Default, 28 Am. Jur. Trials 229.

CHAPTER 10

INJURIES TO PERSONALTY

51-10-1. Right of action for deprivation of possession of personalty.

Law reviews. — For note, "Vesting Title in a Murderer: Where is the Equity in the Georgia Supreme Court's Interpretation of the Slayer Statute in Levenson?," see 45 Ga. L. Rev. 877 (2011).

JUDICIAL DECISIONS

Conversion based on breach of fiduciary duty. — Trial court properly granted a judgment on the pleadings for a limited liability company (LLC), as a president failed to allege a breach of fiduciary duty by the LLC. Tidikis v. Network for Med. Communs. & Research, LLC, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

Trial court erred in granting a judgment on the pleadings for two founders of a limited liability company and a corporation as a tort action could be based on a duty imposed by law, a president arguably had a breach of fiduciary duty claim, and the fact that the allegedly converted items were intangible did not bar the conversion claim; the claim that the president had abandoned the conversion claim as to the corporation was rejected as it was based on a conclusory allegation. Tidikis v. Network for Med. Communs. & Research, LLC, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

Conversion established by improper disposal of personal property. — Trial court properly found a couple liable for converting personal property belonging to an owner with whom the couple were involved in a dispute over certain real property since the couple wrongfully had a salvage company dispose of the personal property instead of complying with O.C.G.A. § 44-7-55(c), by placing the property at the front of the lot. However, the damages award of $192,487.13 in favor of the owner was vacated as the owner's opinion testimony as to the value of the owner's property was insufficient for valuation purposes. Washington v. Harrison, 299 Ga. App. 335, 682 S.E.2d 679 (2009), cert. denied, No. S09C2052, 2010 Ga. LEXIS 45 (Ga. 2010).

Criminal statute did not authorize private right of action. — O.C.G.A. §§ 44-12-20 and 51-10-1 did not authorize a mortgage borrower to bring a claim against a loan servicer for theft by conversion based on criminal statutes; the criminal statutes did not create a private right of action, and the borrower was limited to a tort claim for conversion. Stroman v. Bank of Am. Corp., 852 F. Supp. 2d 1366 (N.D. Ga. 2012).

Recovery of damages against government official.

Pretrial detainee's 42 U.S.C. § 1983 federal due process claims concerning the loss of the detainee's personal property by prison officers was dismissed upon summary judgment because the detainee could pursue the claims pursuant to O.C.G.A. § 51-10-1, as the underlying incidents concerning the loss of theft of the detainee's property did not appear to be the result of an established state procedure. Price v. Busbee, No. 5:04-CV-313 (CAR), 2006 U.S. Dist. LEXIS 8159 (M.D. Ga. Feb. 21, 2006).

In a 42 U.S.C. § 1983 case when: (1) a pro se state inmate alleged that prison employees confiscated and destroyed the inmate's personal property; (2) the inmate did not allege that the confiscation was pursuant to established state procedure; and (3) O.C.G.A. § 51-10-1 provided the inmate with a post-deprivation remedy in state court, there was no Fourteenth Amendment due process violation; the complaint was dismissed as frivolous pursuant to 28 U.S.C. § 1915A. Poole v. Hart,

No. 7:07-CV-35 (HL), 2007 U.S. Dist. LEXIS 30037 (M.D. Ga. Apr. 24, 2007).

Trial court erred in refusing to allow a prison inmate to proceed on a state law conversion claim against the Georgia Department of Corrections under the Georgia Tort Claims Act (GTCA), O.C.G.A. § 50-21-20 et seq., because the inmate stated a claim for conversion against the Department under the GTCA; the inmate alleged that prison officials wrongfully confiscated the inmate's personal property contrary to the Department's Standard Operating Procedures. Romano v. Ga. Dep't of Corr., 303 Ga. App. 347, 693 S.E.2d 521 (2010).

Trial court did not err in disallowing a prison inmate to file a conversion claim against a warden and corrections officers under the Georgia Tort Claims Act (GTCA), O.C.G.A. § 50-21-20 et seq., because their actions were clothed with official immunity under the GTCA, O.C.G.A. § 50-21-25(b), since they were acting within the scope of their official duties when they confiscated the inmate's personal property; the inmate acknowledged that the Georgia Department of Corrections had to be named as a defendant, which necessarily amounted to a concession that Department employees were not proper defendants, and their alleged tortious conduct occurred while they were acting within the scope of their official duties. Romano v. Ga. Dep't of Corr., 303 Ga. App. 347, 693 S.E.2d 521 (2010).

Conversion established by improper disposal of company property. — Trial court did not err in denying property owners' motions for a directed verdict and for judgment notwithstanding the verdict on a limited liability company's (LLC) counterclaim for conversion, which was predicated on the owners' disposal of pipe fixtures the LLC owned, because the evidence was sufficient to support the LLC's counterclaim for conversion; the owners exercised dominion and control over the pipe fixtures by having the fixtures removed from the owners' property and disposed of at a landfill, and even if the LLC acted wrongfully by depositing and storing the pipe fixtures on the owners' property, there was evidence that the owners failed to exercise due care in removing the expensive fixtures by having the fixtures dumped at a landfill with no consideration given as to the fixtures ultimate fate. Parris Props., LLC v. Nichols, 305 Ga. App. 734, 700 S.E.2d 848 (2010).

Conversion claim barred by judicial estoppel. — Summary judgment for finance company was affirmed as an individual's conversion claim was barred by judicial estoppel since: (1) the individual represented in Chapter 7 bankruptcy proceedings that the individual did not have any contingent or unliquidated claims; (2) the individual knew when the bankruptcy petition was filed that the individual's car had been taken without the individual's permission; (3) the bankruptcy trustee accepted the individual's representations as true for purposes of discharging the individual; and (4) any successful pursuit of the claim would allow the individual to realize gains inaccessible to the creditors. Zahabiuon v. Auto. Fin. Corp., 281 Ga. App. 55, 635 S.E.2d 342 (2006).

Judgment on the pleadings improper. — Trial court erred in entering judgment on the pleadings for the defendants as, while in a conversion count, a chief executive officer arguably attempted to create a tort claim from a breach of contract, the officer alleged that the defendants owed him a fiduciary duty. Tidikis v. Network for Med. Communs. & Research, LLC, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

Summary judgment on conversion claim not warranted. — Summary judgment was not warranted because a couple could be liable to an owner for conversion under O.C.G.A. § 51-10-1 if it was true that the couple lied regarding the whereabouts of the owner's belongings and that the couple sold some of the owner's possessions. Santiago v. Cauley, No. CV203-099, 2005 U.S. Dist. LEXIS 34768 (S.D. Ga. Dec. 6, 2005).

No conversion shown. — In a suit alleging a claim for trespass to personality after a creditor erroneously took the property of two non-debtors when the creditor executed a writ of possession of a debtor, the non-debtors neither possessed the items when the levy occurred nor did the non-debtors expect to regain possession of the items at any particular time and

therefore failed to state a claim for trespass to personality; the undisputed evidence showed that the non-debtors loaned the items in question to the debtor for use in the debtor's dental practice with the understanding that the debtor could use the items as long as needed. Dierkes v. Crawford Orthodontic Care, P.C., 284 Ga. App. 96, 643 S.E.2d 364 (2007).

Court of appeals did not err in affirming the trial court's order granting defense attorneys and their law firm summary judgment in an administrator's action alleging that they converted estate property when they accepted certain sums as payment for their services in representing a decedent's widow after the widow was indicted for the decedent's murder because O.C.G.A. § 53-1-5 did not place possession or an immediate right to possession of the estate property in the administrator at the time the widow dispersed and appellees received the funds in issue; when the widow dispersed the funds, the widow had qualified as executor of the decedent's estate and letters testamentary had been issued to the widow, the widow had not yet pled guilty to the murder charges, no final judgment of conviction had been entered in regard to the criminal indictment, and the widow's felonious and intentional killing of the decedent had not been established by clear and convincing evidence in any judicial proceeding. Levenson v. Word, 286 Ga. 114, 686 S.E.2d 236 (2009).

Cited in Taylor v. Powertel, Inc., 250 Ga. App. 356, 551 S.E.2d 765 (2001); Honig v. Comcast of Ga. I, LLC, 537 F. Supp. 2d 1277 (N.D. Ga. 2008).

51-10-2. Who may bring an action for interference with possession of chattel.

JUDICIAL DECISIONS

Buyer at foreclosure sale had no claim against true owner of car. — Because a foreclosure sale of a car had been held void, buyers who purchased the car after the foreclosure were not the car's true owners and could not bring a claim of trespass to personalty against the corporation that was the car's true owner. Mitsubishi Motors Credit of Am., Inc. v. Sheridan, 286 Ga. App. 791, 650 S.E.2d 357 (2007), cert. denied, No. S07C1842, 2007 Ga. LEXIS 751 (Ga. 2007).

Action by estate administrator to recover legal fees paid by spouse who killed other spouse. — Court of appeals did not err in affirming the trial court's order granting defense attorneys and their law firm summary judgment in an administrator's action alleging that they converted estate property when they accepted certain sums as payment for their services in representing a decedent's widow after the widow was indicted for the decedent's murder because O.C.G.A. § 53-1-5 did not place possession or an immediate right to possession of the estate property in the administrator at the time the widow dispersed and appellees received the funds in issue; when the widow dispersed the funds, the widow had qualified as executor of the decedent's estate and letters testamentary had been issued to the widow, the widow had not yet pled guilty to the murder charges, no final judgment of conviction had been entered in regard to the criminal indictment, and the widow's felonious and intentional killing of the decedent had not been established by clear and convincing evidence in any judicial proceeding. Levenson v. Word, 286 Ga. 114, 686 S.E.2d 236 (2009).

51-10-3. Abuse of or damage to personalty as trespass.

JUDICIAL DECISIONS

Gist of action of trespass to personal property is injury done to possession of property.

When a debtor sued a bank for breach of contract, trespass, conversion, tortious interference with contractual relations, and tortious interference with business relations, a judgment notwithstanding the verdict was correctly granted on the trespass claim because the debtor did not show, under O.C.G.A. § 51-10-3, that the bank abused or damaged the debtor's personal property as the bank, under a management agreement, owned the invoices regarding which there was alleged to have been a trespass. Dalton Diversified, Inc. v. AmSouth Bank, 270 Ga. App. 203, 605 S.E.2d 892 (2004).

Officer's action not illegal. — Arrestee failed to state a claim of trespass to property based on the fact that officers investigating a situation took a drink from the arrestee's store because the record showed that an officer was given permission by the store clerk to fix a fountain drink and there was no evidence that money or property was taken or stolen by the officers. Lavassani v. City of Canton, 760 F. Supp. 2d 1346 (N.D. Ga. 2010).

51-10-6. Owner's right of action for damage to or theft involving personal property.

JUDICIAL DECISIONS

Cited in Action Marine, Inc. v. Cont'l Carbon, Inc., 481 F.3d 1302 (11th Cir. 2007); Honig v. Comcast of Ga. I, LLC, 537 F. Supp. 2d 1277 (N.D. Ga. 2008).

CHAPTER 11

DEFENSES TO TORT ACTIONS

Article 1

General Provisions

Sec.

51-11-9. Immunity from civil liability for threat or use of force in defense of habitation.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Last Clear Chance, 32 POF2d 625.

The Seatbelt Defense, 3 POF3d 171.

Act of God, 6 POF3d 319.

Existence of "Sudden Emergency", 8 POF3d 399.

Assumption of Risk Defense in Sports or Recreation Injury Cases, 30 POF3d 161.

Plaintiff's Negligence, Provocation or Assumption of Risk as Defense in Dogbite Case, 39 POF3d 133.

Application of the "Plain View Doctrine" to Trip-and-Fall Claims, 41 POF3d 65.

Proof of Seatbelt Defense, 65 POF3d 1.

ARTICLE 1

GENERAL PROVISIONS

51-11-1. Authorization to act as justification; effect of plea.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 27 (2006).

51-11-2. Effect of consent.

JUDICIAL DECISIONS

Consent not possible where danger not appreciated.

In a tort action filed by a nine-year-old child's parent, as next friend, the appeals court declined to assume that merely because the child assented to the requests of adults, the child consented to the treatment the adults imposed. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Minor incapable of consenting. — Summary judgment was properly denied on a parent's claim of intentional infliction of emotional distress, false arrest, false imprisonment, and invasion of privacy arising out of an accusation by store employees that the parent's nine-year-old child stole from the store because the child was below the age of 13, the age of criminal responsibility under O.C.G.A. § 16-3-1, and was legally incapable of giving consent to their actions under O.C.G.A. § 51-11-2 and 51-11-6. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Patient's consent to touch.

Summary judgment was properly granted, dismissing a patient's suit alleging that a chiropractor committed battery against during chiropractic treatment, because the evidence showed that the patient consented to the adjustment; while the patient contended that the chiropractor's touching exceeded the scope of consent, the patient had not pointed to any evidence that the chiropractor performed a procedure other than an adjustment that day. Prince v. Esposito, 278 Ga. App. 310, 628 S.E.2d 601 (2006).

Security guard assumed risk of injury when guard deliberately tried to stop fight. — Evidence clearly and palpably showed that the security guard was injured when the guard attempted to break up the fight between the patient and the nurse. The security guard deliberately entered the fight and assumed the risk of injury by voluntarily confronting those who had begun the fight; thus, the security guard assumed the risk. Carter v. Scott, No. A12A2435, 2013 Ga. App. LEXIS 95 (Feb. 22, 2013).

Consent not fraudulently obtained. — Evidence did not support a patient's contention that a chiropractor obtained the patient's consent fraudulently by misrepresenting the effects of long-term chiropractic care as the patient was treated by the chiropractor for 12 years without significant problems and was pain-free when the patient took advantage of the free adjustment; the chiropractor had no duty to disclose negative information about a prior battery claim to patients. Prince v. Esposito, 278 Ga. App. 310, 628 S.E.2d 601 (2006).

Female restaurant employee, who fell for a telephone prank and allowed a male supervisor to strip-search her for evidence of a coin purse theft, was not entitled to recover on any of the state law tort claims brought against the supervisor and the restaurant-employer because the employee consented to the search; further, there was no evidence that the supervisor thwarted the employee's capacity to con-

sent or obtained consent by fraud within the meaning of O.C.G.A. § 51-11-2. Fogal v. Coastal Rest. Mgmt., Inc., 452 F. Supp. 2d 1286 (S.D. Ga. 2004).

Withdrawal of consent. — Evidence did not support a patient's contention that questions of fact remained regarding whether the patient withdrew the consent given to a chiropractor during an adjustment since the patient did not ask the chiropractor to stop the adjustment or otherwise speak to him during the treatment; the fact that the patient gasped or expelled air when the chiropractor pushed down on the lower back could not reasonably be considered a withdrawal of consent. Prince v. Esposito, 278 Ga. App. 310, 628 S.E.2d 601 (2006).

Summary judgment improper because there was issue of fact as to assumption of risk. — Trial court erred in granting a police officer and a city summary judgment, on the ground that the officer was performing a discretionary duty and the city was protected by sovereign immunity, in an arrestee's action to recover damages for injuries sustained when the officer ran over the arrestee's foot with a patrol car during the arrest. A jury would be authorized to find that the officer did not act intentionally, but rather, negligently came too close to the arrestee with the car for the purposes that the officer was trying to achieve and used poor judgment under the circumstances; there was an issue of fact on whether the arrestee assumed the risk of injury because it was not beyond dispute that the arrestee was aware of the actual risk of being hit by the officer or that the arrestee had subjective knowledge that the arrestee was at risk of being hit from behind by a police car being driven by a trained officer when the arrestee had not threatened the officer with deadly force. Davis v. Batchelor, 300 Ga. App. 662, 686 S.E.2d 314 (2009).

51-11-6. Infancy.

JUDICIAL DECISIONS

Consent not possible where danger not appreciated. — In a tort action filed by a nine-year-old child's parent, as next friend, the appeals court declined to assume that merely because the child assented to the requests of adults, the child consented to the treatment the adults imposed. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

51-11-7. Effect of plaintiff's failure to avoid consequences of defendant's negligence.

Law reviews. — For article, "Sexual Harassment Claims Under Georgia Law," see 6 Ga. St. B.J. 16 (2000).

JUDICIAL DECISIONS

Analysis

General Consideration
1. In General
3. Avoidance Doctrine
6. Jury Instructions
7. Jury Questions
Applicability to Specific Cases
1. Motor Vehicles

4. Landlord-Tenant
5. Miscellaneous

General Consideration

1. In General

Contributory and comparative negligence apply to professional negligence and negligent misrepresentation claims. — See Prime Retail Dev., Inc. v. Marbury Eng'g Co., 270 Ga. App. 548, 608 S.E.2d 534 (2004).

Cited in Baker v. Harcon, Inc., 303 Ga. App. 749, 694 S.E.2d 673 (2010).

3. Avoidance Doctrine

Avoidance doctrine stated.

Where evidence showed an employee for defendant gas station saw woman and her attacker with no car or gas container fighting by a gas pump, and the employee then activated the pump for the attacker which allowed the woman to be sprayed with gas and set on fire, the district court's denial of the station's motion for judgment as a matter of law was proper, and because the evidence showed that the woman had previously calmed the attacker down, the jury could have reasonably found, under O.C.G.A. § 51-11-7, the woman was 25 percent negligent but that by ordinary care could not have avoided the consequences of the employee's negligent act of authorizing the pump to be used. Currie v. Chevron U.S.A., Inc., 266 Fed. Appx. 857 (11th Cir. 2008) (Unpublished).

It is incumbent upon plaintiff to use degree of care necessary under circumstances, etc.

There is a presumption in a medical malpractice case that the physician performed in an ordinarily skillful manner so that the burden is upon the plaintiff to show a want of care or skill; a veteran whose leg was amputated after the veteran failed to comply with a Veterans Administration (VA) treatment plan for the veteran's diabetes and related foot ulcer failed to show that VA personnel breached the standard of care set out in O.C.G.A. § 51-1-27 and that the amputation would have been unnecessary if another treatment plan had been used. Moreover, the VA's evidence plainly established that the veteran's negligence in failing to comply with the veteran's treatment plan exceeded the negligence, if any, by VA personnel, so the veteran could not recover under O.C.G.A. § 51-11-7. Kimbrough v. United States Gov't, No. 1:07-CV-1517-RWS, 2008 U.S. Dist. LEXIS 77793 (N.D. Ga. Oct. 2, 2008).

6. Jury Instructions

Judge must charge comparative negligence principles, etc.

In a medical malpractice action, where part of the defense was that the injuries for which plaintiff sought recovery were attributable to plaintiff's negligence in failing to submit to recommended treatment, a charge on the contributory-negligence rule was appropriate and, as there was evidence that the injuries were also the product of defendant's negligence, a charge on comparative-negligence and its "equal to or greater than" bar was also warranted. Whelan v. Moone, 242 Ga. App. 795, 531 S.E.2d 727 (2000).

Not harmful error to fail to charge on burden of proof. — Trial court did not commit harmful error under O.C.G.A. § 5-5-24(c) in failing to charge the jury that an engineering firm had the burden of proof as to its affirmative defenses of contributory and comparative negligence; any error did not result in a gross injustice, such as to raise a question as to whether a developer was deprived of a fair trial. Prime Retail Dev., Inc. v. Marbury Eng'g Co., 270 Ga. App. 548, 608 S.E.2d 534 (2004).

Jury charge proper.

Trial court properly instructed a jury on contributory and comparative negligence as to whether a developer's closing on a property without examining a written environmental report amounted to negligence as that issue was a jury question. Prime Retail Dev., Inc. v. Marbury Eng'g Co., 270 Ga. App. 548, 608 S.E.2d 534 (2004).

7. Jury Questions

Failure to read warning was jury question. — Jury question was raised as to whether an injured party would have

seen, and could have read, a warning of the dangers in improperly filling a container with gasoline if the party had exercised ordinary care for the party's own safety; the injured party was not contributorily negligent as a matter of law as the party did not drench himself with gasoline and as it was not shown that the party filled containers with gasoline routinely, had been to the gasoline station before, or was aware of the dangers involved in filling such containers without putting the container on the ground. Camden Oil Co. v. Jackson, 270 Ga. App. 837, 609 S.E.2d 356 (2004).

Sole proximate cause was jury question. — Jury question was raised as to whether an injured party's failure to exercise care for the party's safety in improperly filling a container with gasoline was the sole proximate cause of the injuries to defeat a negligence per se claim based on an oil company's violations of the Georgia Fire Safety Commission; the injured party did not so plainly and palpably fail to exercise ordinary care for the party's own safety as to require summary judgment for the oil company. Camden Oil Co. v. Jackson, 270 Ga. App. 837, 609 S.E.2d 356 (2004).

Applicability to Specific Cases

1. Motor Vehicles

Decedent's contributory negligence barred recovery as a matter of law in a widower's wrongful death suit based on a vehicular collision because the decedent failed to avoid the consequences of defendants' alleged negligence in obstructing the view of a certain left-hand turn with a stalled loader onto a state route familiar to decedent. Weston v. Dun Transp. & Stringer, Inc., 304 Ga. App. 84, 695 S.E.2d 279 (2010).

4. Landlord-Tenant

Owner did not have superior knowledge of danger. — Trial court did not err in granting co-owners' motions for summary judgment in a wrongful death action filed by a decedent's mother and sister because the co-owners did not have superior knowledge of the danger posed by the retaining wall from which the decedent fell, and the decedent had actual knowledge of the hazard; the fact that an owner was negligent per se in failing to comply with a building code does not impose liability where the owner lacks superior knowledge of the hazard. Barnes v. Morgantown Baptist Ass'n, 306 Ga. App. 755, 703 S.E.2d 359 (2010).

5. Miscellaneous

Parking lots. — Whether plaintiff maintained a reasonable lookout for safety in crossing restaurant parking lot, whether plaintiff had greater or equal knowledge of the specific undulation in the pavement which constituted the hazard in this case, and whether plaintiff exercised ordinary care for own safety, were questions of fact to be resolved at trial. Jackson v. Waffle House, Inc., 245 Ga. App. 371, 537 S.E.2d 188 (2000).

In an action by a patron of a fast food restaurant, who fell over a raised curb while walking in the pitch dark of the restaurant's unlit parking lot and distracted by cars using the drive-through lane that she was crossing, the restaurant owner's action in failing to turn on the parking lot lights and the distractions created by the vehicles in the drive-through lane create material issues of fact as to whether the plaintiff exercised ordinary care for her own safety. Hamilton v. Kentucky Fried Chicken of Valdosta, Inc., 248 Ga. App. 245, 545 S.E.2d 375 (2001).

Furnishing alcohol to minor. — Restaurant employee was cited for a liquor license violation. As the employee's failure to appear in court as commanded by the citation was an obviously risky act, which led to the employee's arrest, and there was no showing that the restaurant's or supervisor's acts were wilful and wanton, recovery on the negligence claim against the restaurant and employee was barred by the employee's own negligence pursuant to O.C.G.A. § 51-11-7. Weaver v. Pizza Hut of Am., Inc., 298 Ga. App. 645, 680 S.E.2d 668 (2009), cert. denied, No. S09C1834, 2009 Ga. LEXIS 806 (Ga. 2009).

Warehouse manager injured in gap between trailer and loading dock. — A trial court erred by granting summary

judgment to a driver, an employer, and a package delivery system corporation in a negligence action brought by a warehouse manager who was injured after the manager's foot slipped through an eight inch gap between a trailer and the bumpers of a loading dock as issues of material fact existed for a jury to determine as to whether the injured manager could have avoided the injury or whether the manager's actions in failing to see a gap between the trailer and the bumpers while carrying boxes was reasonable and in the ordinary course of business. McCray v. FedEx Ground Package Sys., 291 Ga. App. 317, 661 S.E.2d 691 (2008), cert. denied, 2008 Ga. LEXIS 664 (Ga. 2008).

Customer failed to exercise ordinary care for own safety. — Trial court did not err in granting a lessee's motion for summary judgment in a customer's premises liability action under O.C.G.A. § 51-3-1 to recover damages for injuries the customer sustained when the customer fell down stairs in a shop because the customer failed to exercise ordinary care for the customer's own safety pursuant to O.C.G.A. § 51-11-7; despite the customer's inability to see beyond the merchandise, the customer continued to move in that direction, and the customer's attempt to walk between or over the thick clutter of merchandise, where there was not an aisle or clear area of floor visible, constituted a voluntary departure from the route designated and maintained by the lessee for customers' safety and convenience and imposed a heightened duty of care for the lessee's own safety. Bartlett v. McDonough Bedding Co., 313 Ga. App. 657, 722 S.E.2d 380 (2012).

RESEARCH REFERENCES

ALR. — Comparative negligence, contributory negligence, and assumption of risk in action against owner of store, office, or similar place of business by invitee falling on tracked-in water or snow, 83 ALR5th 589.

51-11-9. Immunity from civil liability for threat or use of force in defense of habitation.

A person who is justified in threatening or using force against another under the provisions of Code Section 16-3-21, relating to the use of force in defense of self or others, Code Section 16-3-23, relating to the use of force in defense of a habitation, or Code Section 16-3-24, relating to the use of force in defense of property other than a habitation, has no duty to retreat from the use of such force and shall not be held liable to the person against whom the use of force was justified or to any person acting as an accomplice or assistant to such person in any civil action brought as a result of the threat or use of such force. (Code 1981, § 51-11-9, enacted by Ga. L. 1986, p. 515, § 1; Ga. L. 2006, p. 477, § 3/SB 396.)

The 2006 amendment, effective July 1, 2006, substituted the present provisions of this Code section for the former provisions, which read "A person who is justified in threatening or using force against another under the provisions of Code Section 16-3-23, relating to the use of force in defense of a habitation, shall not be held liable in any civil action brought as a result of the threat or use of such force."

CHAPTER 12

DAMAGES

Article 1

General Provisions

Article 2

Joint Tort-feasors

Article 4

Damages in Tort Actions

RESEARCH REFERENCES

Am. Jur. Trials. — Tactics and Strategy of Pleading, 3 Am. Jur. Trials 681.

Trial Brief, 5 Am. Jur. Trials 89.

Showing Pain and Suffering, 5 Am. Jur. Trials 921.

Presenting Plaintiff's Medical Proof-Common Injuries and Conditions, 6 Am. Jur. Trials 1.

Minimizing Personal Injury Damages, 6 Am. Jur. Trials 501.

Predicting Personal Injury Verdicts and Damages, 6 Am. Jur. Trials 963.

Special Verdicts, 6 Am. Jur. Trials 1043.

Determining the Medical and Emotional Bases for Damages, 23 Am. Jur. Trials 479.

Trial Court Restrictions on Evidence of Defendant's Wealth, 30 Am. Jur. Trials 711.

Defense Use of Economist, 31 Am. Jur. Trials 287.

Cost Recovery Litigation: Abatement of Asbestos Contamination, 40 Am. Jur. Trials 317.

Punitive Damages in Products Liability Litigation, 54 Am. Jur. Trials 443.

Presentation and Proof of Damages in Personal Injury Litigation, 59 Am. Jur. Trials 395.

Obtaining Damages in Federal Court for State and Local Police Misconduct, 62 Am. Jur. Trials 547.

U.S. EPA Action under the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), 68 Am. Jur. Trials 1.

Sexual Harassment Damages and Remedies, 73 Am. Jur. Trials 1.

Diet Pill Litigation: The Fen-Phen Debacle, 73 Am. Jur. Trials 485.

Handling a Grade Crossing Collision for Locomotive Occupants, 74 Am. Jur. Trials 1.

Diagnostic Radiology Malpractice Litigation, 75 Am. Jur. Trials 55.

Snack Food Product Liability, 76 Am. Jur. Trials 341.

Using Taxation of Costs to Collect Some Litigation Expenses and Maximize Client Recovery, 84 Am. Jur. Trials 367.

Residential Mold as a Toxic Tort Under Homeowner's Policy, 85 Am. Jur. Trials 41.

Podiatry Malpractice Litigation, 85 Am. Jur. Trials 189.

Landlord's Recovery of Rent After Abandonment or Surrender of Leased Premises, 86 Am. Jur. Trials 1.

Periodontal Malpractice, 89 Am. Jur. Trials 1.

Traumatic Brain Injuries, 90 Am. Jur. Trials 1.

Hair Transplant Malpractice Litigation, 90 Am. Jur. Trials 99.

Damages Provision Affecting Remedies for Purchaser's Default on Real Estate Contract, 91 Am. Jur. Trials 333.

Litigating Toxic Mold Cases, 92 Am. Jur. Trials 113.

Defending the Workers' Compensation Claim in the Trucking Industry, 99 Am. Jur. Trials 1.

Oncology Malpractice Litigation, 100 Am. Jur. Trials 1.

ARTICLE 1

GENERAL PROVISIONS

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Discount Rate for Future Damages, 8 POF2d 1.

General Overview: Death of Person in Labor Force, 13 POF2d 45.

Death of Person Not in Labor Force, 14 POF2d 311.

Losses in Cases of Disability, 15 POF2d 311.

Pain and Suffering, 23 POF2d 1.

Establishing an Adequate Foundation for Proof of Medical Expenses, 23 POF2d 243.

Loss of Prospective Inheritance, 24 POF2d 211.

Period of Economic Loss in Death and Personal Injury Cases, 38 POF2d 195.

Recovery for Severe Burn Injuries, 1 POF3d 197.

Damages for Future Medical Needs of an Injured Child, 4 POF3d 645.

Intangible Damages for Injury to Elderly Person, 5 POF3d 323.

Rehabilitation and Life Care Needs After a Traumatic Brain Injury, 9 POF3d 1.

Psychological Effects of Physical Disfigurement, 9 POF3d 307.

Wife's Damages for Loss of Consortium, 10 POF3d 97.

Traumatic Aggravation of Preexisting Mental Disorder, 12 POF3d 323.

Damages for Loss of Chance of Cure, 12 POF3d 621.

Damages for Sexual Assault, 15 POF3d 259.

Wrongful Death of Fetus, 19 POF3d 107.

Proof of Damages for Decedent's Pain and Suffering, 24 POF3d 337.

Toxic Torts: Proof of Medical Monitoring Damages for Exposure to Toxic Substances, 25 POF3d 313.

Loss of Consortium in Parent-Child Relationship, 27 POF2d 393.

Proof of Lost Earning Capacity, 29 POF3d 259.

Liability of Ski Area Operator for Skiing Accident, 45 POF3d 115.

Liability of Skier for Collision with Another Skier, 46 POF3d 1.

Liability of an Owner or Operator of a Self-Service Filling Station for Injury or Death of a Business Invitee on the Premises, 46 POF3d 161.

Proof of Liability for Food Poisoning, 47 POF3d 47.

Damages for Loss of Enjoyment of Life, 49 POF3d 339.

Proof of Failure to Diagnose Diabetes or Complications of Diabetes, 51 POF3d 1.

Medical Malpractice in Tonsillectomies, 57 POF3d 381.

Proof that a Teacher's License was Improperly Revoked: Teacher's Damages and Emotional Stress Award, 66 POF3d 541.

Proof of Paralysis, 67 POF3d 1.

Sexual Organ Injuries: Male Genitalia, 70 POF3d 229.

Traumatic Brain Injuries, 72 POF3d 363.

Proof of Injury Resulting from Prescription Medication Rezulin, 74 POF3d 141.

Proof of Claims Arising from Exposure to Latex Products, 78 POF3d 259.

Proof of Liability for Failure of Emergency Medical Equipment, 80 POF3d 1.

Lightning or Electrical Storm Causing Injury or Death to Employee, 81 POF3d 1.

Proof of Injury Resulting from Liposuction Surgery, 82 POF3d 1.

51-12-2. General and special damages distinguished; when recovered.

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Damages under Fair Business Practices Act. — An award for general damages under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., is limited to those damages that can be measured by an actual injury suffered, and the general provisions of O.C.G.A. § 51-12-2 are not applicable; furthermore, claims under the Act for equitable relief, exemplary damages, treble damages, and attorney's fees are dependent on actual injury or damage resulting from a violation of the Act. Tiismann v. Linda Martin Homes Corp., 279 Ga. 137, 610 S.E.2d 68 (2005).

Damages in legal malpractice. — Following a finding of legal malpractice, property owners were entitled to special damages under O.C.G.A. § 51-12-2(a) for legal fees and general damages under § 51-12-2(b) based on damage to the owner's business, the anguish of the owner's spouse, and interference with the quiet enjoyment of the owners' property that flowed directly and foreseeably from the attorneys' malpractice. The owner's initial visit to the attorneys was a plea to protect the owners from the consequences of a levy and sale of an interest in the owners' residence, and the sale was exactly what the attorneys failed to prevent. Pullen v. Cornelison (In re Pullen), No. 07-6220, 2010 Bankr. LEXIS 5106 (Bankr. N.D. Ga. Aug. 4, 2010).

Slander and libel actions.

General damages for slander may be recovered under O.C.G.A. § 51-12-2(a) where a defendant has intentionally and wantonly injured the plaintiff's reputation through slander without proof of any amount; where an injured party claimed that the slander concerned the injured party's profession, damage was inferred under O.C.G.A. § 51-5-4(b). Galardi v. Steele-Inman, 259 Ga. App. 249, 576 S.E.2d 555 (2002).

Damages for nuisance and negligence. — Fact that the jury chose to allocate certain amounts of the special damages proven by the testimony between nuisance and negligence claims was not reversible error because the testimony established damages to the property, including diminished value and costs to protect the property, and that total amount was not reflected in the jury's nuisance award; under O.C.G.A. § 51-12-2(a), the jury was authorized to award additional general damages based on the parties' negligence within its enlightened conscience and based on the testimony presented at trial. Ingles Mkts., Inc. v. Kempler, 317 Ga. App. 190, 730 S.E.2d 444 (2012).

Award excessive. — Trial court erred when the court denied a bank's motion for a new trial in a fraud case because the amount of damages awarded was excessive in that the evidence adduced at trial did not authorize the jury's award of $100,000 against the bank because the suing construction company alleged and proved only economic harm in an amount substantially less than that award, namely $9,400 via a materialman's lien, and renovation expenses in the amount of $23,000. Further, the jury's award of an additional $55,000 against the bank as punitive damages was erroneous since there was no charge on punitive damages, let alone proper guidance on the clear and convincing evidence required; the verdict form did not pose the question of punitive damages except by quotation of O.C.G.A. § 51-12-5.1(f), which required the jury to find specific intent to cause harm before the jury could award punitive damages in excess of $250,000; and the proceedings were not properly bifurcated. First Southern Bank v. C & F Servs., 290 Ga. App. 304, 659 S.E.2d 707 (2008).

Award in nuisance suit not excessive. — In a nuisance suit brought by a property owner against the City of At-

lanta, which involved the city failing to properly maintain a storm pipe that traversed and served the property owner's land and resulted in extensive flooding of the land and the home, the trial court properly awarded compensatory damages in the amount of $300,000 and that amount was not excessive, as a matter of law, as there was evidence that the property owner suffered special damages in the amount of $203,376, including loss of personal property, diminution in the value of the property, and rental expenses incurred when the property owner was forced to move from the home. There was also sufficient evidence to support an award of damages for personal injuries and damages for annoyance and discomfort based on the property owner spending over seven years battling sinkholes in the yard and flooding in the home, the home being infested with rats, insects, and mold, and the property owner's physician testifying that the property owner smelled of mold and suffered from mold-induced migraines. City of Atlanta v. Hofrichter, 291 Ga. App. 883, 663 S.E.2d 379 (2008).

Damages on fraud claim. — In a breach of contract and fraud action, the appellate court refused to disturb the jury's verdict awarding the lessor general damages because such damages were available on a fraud claim and there simply was no basis to overturn the verdict. Goody Prods. v. Dev. Auth. of Manchester, No. A12A1725, 2013 Ga. App. LEXIS 229 (Mar. 20, 2013).

Cited in Cavin v. Brown, 246 Ga. App. 40, 538 S.E.2d 802 (2000).

51-12-3. Direct and consequential damages distinguished.

JUDICIAL DECISIONS

Proof of physical injury lacking. — In a negligence action stemming from an auto accident between a driver and a farmer's cow, the trial court properly granted summary judgment on the driver's claim for consequential damages, which was sought for a "ruined vacation," as the driver failed to show any evidence of a physical injury which was a necessary element on a claim premised on ordinary negligence. Hoeflick v. Bradley, 282 Ga. App. 123, 637 S.E.2d 832 (2006).

Consequential damages for outstanding vehicle loan amount. — Trial court properly granted summary judgment to a driver on the owner's claim to recover the loan deficiency on the owner's wrecked vehicle as consequential damages because the owner had already been compensated for the fair market value of the wrecked vehicle and, pursuant to O.C.G.A. §§ 51-12-3(b), 51-12-8, and 51-12-9, the owner's outstanding vehicle loan amount was not the legal and natural consequence of the collision. McIntire v. Perkins, 317 Ga. App. 181, 729 S.E.2d 529 (2012), cert. denied, No. S12C1976, 2013 Ga. LEXIS 37 (Ga. 2013).

51-12-4. Damages given as compensation for injury; measure of damages generally; nominal damages.

Law reviews. — For annual survey of product liability law, see 58 Mercer L. Rev. 313 (2006). For article, "The Experiential Future of the Law," see 60 Emory L. J. 585 (2011).

JUDICIAL DECISIONS

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General Consideration
Measure of Damages Applicable to Specific Cases

General Consideration

Cited in Conner v. Hart, 252 Ga. App. 92, 555 S.E.2d 783 (2001); Land v. Boone, 265 Ga. App. 551, 594 S.E.2d 741 (2004).

Measure of Damages Applicable to Specific Cases

Loss of use of cable. — Telecommunications carrier could not recover loss of use damages absent some showing of monetary loss apart from the cost of repair because although the carrier suffered a loss of use of its cable, it did not show sufficient proof of loss of use damages; the proper measure of loss of use damages was not the theoretical rental value of a fiber-optic cable in a market that does not exist. MCI Communs. Servs. v. CMES, Inc., 291 Ga. 461, 728 S.E.2d 649 (2012).

Telecommunications carrier was not entitled to loss of use damages measured by the hypothetical cost to rent a replacement system when the carrier suffered no actual loss of use damages and did not need to rent a replacement system because the carrier was able to reroute calls within the existing redundant cable system the carrier necessarily installed in order to operate the carrier's business. MCI Communs. Servs. v. CMES, Inc., 291 Ga. 461, 728 S.E.2d 649 (2012).

RESEARCH REFERENCES

ALR. — Excessiveness or adequacy of damages for wrongful termination of at-will employee under state law, 86 ALR5th 397.

51-12-5. Additional damages for aggravating circumstances.

JUDICIAL DECISIONS

Analysis

General Consideration

Punitive damages are not supportable when the tort is not proved.

In an attorney negligence case, the district court's interlocutory ruling excluding the clients' expert was case-dispositive, as the crux of the clients' unjust enrichment and breach of fiduciary duty claims was the law firm's failure to meet the standard of care imposed by the attorney-client relationship; both the breach of fiduciary duty and unjust enrichment counts incorporated the allegations of legal malpractice without adding any independent factual allegations, and the latter count expressly alleged that the law firm was unjustly enriched by receiving compensation for defective, unskillful, and harmful legal advice. Additionally, the clients' O.C.G.A. § 13-6-11 attorney's fee claim and O.C.G.A. § 51-12-5.1 punitive damages claim were not supportable without an award of relief on an underlying claim; thus, the clients' claims, as pled, all required proof of attorney malpractice, and the interlocutory ruling excluding the clients' expert's testimony was case-dispositive. OFS Fitel, LLC v. Epstein, 549 F.3d 1344 (11th Cir. 2008).

Applicability to Specific Cases

3. Property

Transactions between mortgagor and mortgagee. — Mortgage companies were not liable for punitive damages to real estate investors whose credit scores allegedly were injured after the companies' failure to timely pay a tax bill triggered the filing of a county tax lien and after the companies erroneously reported having foreclosed a mortgage granted to the investors. The investors adduced no evidence from which a jury could construe that the companies' erroneous handling of these matters was willful or consciously

indifferent to the investors' interests, and thus they did not satisfy the criteria for an award of punitive damages pursuant to O.C.G.A. § 51-12-5.1(b). Burch v. Chase Manhattan Mortg. Corp., No. 1:07-CV-0121-JOF, 2008 U.S. Dist. LEXIS 76595 (N.D. Ga. Sept. 15, 2008).

51-12-5.1. Punitive damages.

(a) As used in this Code section, the term "punitive damages" is synonymous with the terms "vindictive damages," "exemplary damages," and other descriptions of additional damages awarded because of aggravating circumstances in order to penalize, punish, or deter a defendant.

(b) Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.

(c) Punitive damages shall be awarded not as compensation to a plaintiff but solely to punish, penalize, or deter a defendant.

(d)(1) An award of punitive damages must be specifically prayed for in a complaint. In any case in which punitive damages are claimed, the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made. This finding shall be made specially through an appropriate form of verdict, along with the other required findings.

(2) If it is found that punitive damages are to be awarded, the trial shall immediately be recommenced in order to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case. It shall then be the duty of the trier of fact to set the amount to be awarded according to subsection (e), (f), or (g) of this Code section, as applicable.

(e)(1) In a tort case in which the cause of action arises from product liability, there shall be no limitation regarding the amount which may be awarded as punitive damages. Only one award of punitive damages may be recovered in a court in this state from a defendant for any act or omission if the cause of action arises from product liability, regardless of the number of causes of action which may arise from such act or omission.

(2) Seventy-five percent of any amounts awarded under this subsection as punitive damages, less a proportionate part of the costs of litigation, including reasonable attorney's fees, all as determined by the trial judge, shall be paid into the treasury of the state through the Office of the State Treasurer. Upon issuance of judgment in such a

case, the state shall have all rights due a judgment creditor until such judgment is satisfied and shall stand on equal footing with the plaintiff of the original case in securing a recovery after payment to the plaintiff of damages awarded other than as punitive damages. A judgment debtor may remit the state's proportional share of punitive damages to the clerk of the court in which the judgment was rendered. It shall be the duty of the clerk to pay over such amounts to the Office of the State Treasurer within 60 days of receipt from the judgment debtor. This paragraph shall not be construed as making the state a party at interest and the sole right of the state is to the proceeds as provided in this paragraph.

(f) In a tort case in which the cause of action does not arise from product liability, if it is found that the defendant acted, or failed to act, with the specific intent to cause harm, or that the defendant acted or failed to act while under the influence of alcohol, drugs other than lawfully prescribed drugs administered in accordance with prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to that degree that his or her judgment is substantially impaired, there shall be no limitation regarding the amount which may be awarded as punitive damages against an active tort-feasor but such damages shall not be the liability of any defendant other than an active tort-feasor.

(g) For any tort action not provided for by subsection (e) or (f) of this Code section in which the trier of fact has determined that punitive damages are to be awarded, the amount which may be awarded in the case shall be limited to a maximum of $250,000.00.

(h) This Code section shall apply only to causes of action arising on or after April 14, 1997. (Code 1981, § 51-12-5.1, enacted by Ga. L. 1987, p. 915, § 5; Ga. L. 1993, p. 1402, § 18; Ga. L. 1997, p. 837, § 1; Ga. L. 2010, p. 863, § 2/SB 296.)

The 2010 amendment, effective July 1, 2010, substituted "Office of the State Treasurer" for "Office of Treasury and Fiscal Services" in the first and fourth sentences of paragraph (e)(2).

Law reviews. — For article, "Premises Liability for Criminal Attacks: Same Crimes, New Law," see 5 Ga. St. B.J. 54 (1999). For article, "Insurance," see 53 Mercer L. Rev. 281 (2001). For annual survey of construction law, see 56 Mercer L. Rev. 109 (2004). For annual survey of law of torts, see 56 Mercer L. Rev. 433 (2004). For survey article on labor and employment law, see 60 Mercer L. Rev. 217 (2008). For survey article on tort law, see 60 Mercer L. Rev. 375 (2008). For annual survey on zoning and land use law, see 61 Mercer L. Rev. 427 (2009). For article, "Practice Point: Right of Publicity: A Practitioner's Enigma," see 17 J. Intell. Prop. L. 351 (2010). For article, "The Experiential Future of the Law," see 60 Emory L. J. 585 (2011).

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General Consideration
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General Consideration

Due process guideposts for punitive damages are based on the principle that a person receive fair notice not only of the conduct that will subject the person to punishment, but also of the severity of the penalty that a state may impose; O.C.G.A. § 51-12-5.1(f) informs the public that the $250,000 cap on punitive damages in Georgia does not apply to torts where the defendant acted or failed to act while under the influence of alcohol, drugs, or other judgment altering substances. Craig v. Holsey, 264 Ga. App. 344, 590 S.E.2d 742 (2003), cert. denied, 543 U.S. 820, 125 S. Ct. 59, 160 L. Ed. 2d 29 (2004).

When punitive damages awarded. — Under O.C.G.A. § 51-12-5.1(b), punitive damages may be awarded only when it is established by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences. That Code section further limits punitive damages to a maximum of $250,000 for any tort action, unless the trier of fact finds that the defendant acted, or failed to act, with the specific intent to cause harm. A finding of specific intent to cause harm pursuant to O.C.G.A. § 51-12-5.1(f) is inherent in the essential elements of such an intentional fraud. Golden Atlanta Site Dev., Inc. v. Tilson, 299 Ga. App. 646, 683 S.E.2d 166 (2009).

Jury, not judge, must determine both whether and in what amount to award punitive damages. — Tenant whose former landlord cashed a check for property taxes that the tenant mailed to the landlord by mistake was entitled to summary judgment on a claim for conversion and bad faith attorney's fees under O.C.G.A. § 13-6-11; however, under O.C.G.A. § 51-12-5.1(d), the question of whether punitive damages should be awarded and the amount thereof was for a jury. Covington Square Assocs., LLC v. Ingles Mkts., Inc., 300 Ga. App. 740, 686 S.E.2d 359 (2009), aff'd in part and rev'd in part, 287 Ga. 445, 696 S.E.2d 649 (2010).

Reapportionment of total award required. — Trial court did not err by entering a judgment awarding punitive damages against defendant since clear and convincing evidence established that defendant, along with others, conspired to defraud plaintiff and defendant received the most amount of money fraudulently. However, the award against defendant in the amount of $250,000 individually required reduction as O.C.G.A. § 51-12-5.1(g) limited the total punitive damages award to $250,000 for any tort; therefore, reapportionment of the punitive damages award was required among the three defendants against whom such awards were found using the same ratio that had been devised by the jury in the jury's original apportionment of punitive damages. Surles v. Cornell Corr. of Cal., Inc., 290 Ga. App. 260, 659 S.E.2d 683 (2008).

Punitive damages may not be recovered where there is no entitlement to compensatory damages; where a homeowner had settled the homeowner's property damage claim arising from an incident where a truck struck the homeowner's house, and was not allowed to recover under the bodily injury provision of the policy since the homeowner was not injured in and did not witness the incident, summary judgment for an insurance company in its declaratory judgment action addressing its liability on the homeowner's punitive damage claim was affirmed. Flynn v. Allstate Ins. Co., 268 Ga. App. 222, 601 S.E.2d 739 (2004).

Punitive damages not recoverable when underlying tort failed. — Bidding insurer's claim for punitive damages against a consultant and a consulting firm failed as the insurer could not recover on its underlying tort claims. Benefit Support, Inc. v. Hall County, 281 Ga. App. 825, 637 S.E.2d 763 (2006), cert. denied, No.

S07C0306, 2007 Ga. LEXIS 214 (Ga. 2007).

Trial court did not err in granting a car dealer summary judgment against a customer's fraud claim, as: (1) the customer's contention that the dealer knew of the alleged defects in a car sold to the customer at the time of the sale was specifically negated by affidavits submitted by the dealer's service and maintenance employees; and (2) even if the dealer knew of the car's defectiveness after the sale, this knowledge did not amount to either knowledge, or a reckless disregard of the car's defectiveness, at the time of the sale; hence, as a result, the trial court did not err in granting the dealer's motion for summary judgment on the customer's claims for attorney fees under O.C.G.A. § 13-6-11, and punitive damages pursuant to O.C.G.A. § 51-12-5.1. Morris v. Pugmire Lincoln Mercury, Inc., 283 Ga. App. 238, 641 S.E.2d 222 (2007).

When a client in a legal malpractice action failed to demonstrate that genuine issues of fact existed as to whether the attorney had proximately caused the client any damages, the trial court did not err in granting the attorney summary judgment on the client's claims for punitive damages and for attorney fees under O.C.G.A. §§ 13-6-11 and 51-12-5.1. Amstead v. McFarland, 287 Ga. App. 135, 650 S.E.2d 737 (2007), cert. denied, 2007 Ga. LEXIS 769 (Ga. 2007).

Because a customer had not shown that a restaurant was liable on the customer's tort claims, it was proper to grant summary judgment for the restaurant on the customer's claims for attorney fees and punitive damages under O.C.G.A. §§ 13-6-11 and 51-12-5.1. Dowdell v. Krystal Co., 291 Ga. App. 469, 662 S.E.2d 150 (2008), cert. denied, 2008 Ga. LEXIS 787 (Ga. 2008).

Proposed amended complaint's new claim for punitive damages, per O.C.G.A. § 51-12-5.1, would have been futile because the complaint made conclusory allegations with no factual basis. Because punitive damages are derivative of substantive tort claims, and thus can only be awarded as additional damages, and because the plaintiff had failed to allege a valid tort, let alone demonstrate that any of the plaintiff's claims were viable and could survive the defendant's motion to dismiss, her claim for punitive damages would have necessarily failed. Alhallaq v. Radha Soami Trading, LLC, No. 11-15554, 2012 U.S. App. LEXIS 11285 (11th Cir. June 5, 2012) (Unpublished).

Punitive damages claims were derivative of those underlying claims that would give rise to punitive damages under O.C.G.A. § 51-12-5.1; because the court had dismissed all of the plaintiff's claims for relief, the plaintiff's request for punitive damages necessarily failed. Warthen v. Litton Loan Servicing LP, No. 1:11-cv-02704-JEC, 2012 U.S. Dist. LEXIS 135748 (N.D. Ga. Mar. 23, 2012).

Punitive damages may be given even where, etc.

In accord with McClure v. Gower. See Tyler v. Lincoln, 272 Ga. 118, 527 S.E.2d 180 (2000).

Plaintiff failed to show viable claim. — Because the plaintiff failed to establish that the plaintiff had any viable claims against the defendant, the plaintiff could not recover punitive damages under O.C.G.A. § 51-12-5.1(b). Gordon v. Starwood Hotels & Resorts Worldwide, Inc., No. 1:09-CV-3493-CC, 2011 U.S. Dist. LEXIS 109644 (N.D. Ga. Sept. 26, 2011).

Cited in Smithson v. Parker, 242 Ga. App. 133, 528 S.E.2d 886 (2000); Artzner v. A & A Exterminators, Inc., 242 Ga. App. 766, 531 S.E.2d 200 (2000); Griffin v. Associated Payphone, 244 Ga. App. 183, 534 S.E.2d 540 (2000); Cavin v. Brown, 246 Ga. App. 40, 538 S.E.2d 802 (2000); Felker v. Chipley, 246 Ga. App. 296, 540 S.E.2d 285 (2000); Crosby v. Kendall, 247 Ga. App. 843, 545 S.E.2d 385 (2001); Tunsil v. Jackson, 248 Ga. App. 496, 546 S.E.2d 875 (2001); Wal-Mart Stores, Inc. v. Johnson, 249 Ga. App. 84, 547 S.E.2d 320 (2001); Ledee v. Devoe, 250 Ga. App. 15, 549 S.E.2d 167 (2001); Thomas v. Atlanta Cas. Co., 253 Ga. App. 199, 558 S.E.2d 432 (2001); Baker v. Campbell, 255 Ga. App. 523, 565 S.E.2d 855 (2002); Johnson v. First Union Nat'l Bank, 255 Ga. App. 819, 567 S.E.2d 44 (2002); Hubbard v. DOT, 256 Ga. App. 342, 568 S.E.2d 559 (2002); Demido v. Wilson, 261 Ga. App. 165, 582 S.E.2d 151 (2003); D. G. Jenkins Homes,

Inc. v. Wood, 261 Ga. App. 322, 582 S.E.2d 478 (2003); Land v. Boone, 265 Ga. App. 551, 594 S.E.2d 741 (2004); Williams Gen. Corp. v. Stone, 279 Ga. 428, 614 S.E.2d 758 (2005); Aldworth Co. v. England, 281 Ga. 197, 637 S.E.2d 198 (2006); Brookview Holdings, LLC v. Suarez, 285 Ga. App. 90, 645 S.E.2d 559 (2007); Imm v. Chaney, 287 Ga. App. 606, 651 S.E.2d 855 (2007); Ferman v. Bailey, 292 Ga. App. 288, 664 S.E.2d 285 (2008); Golden Atlanta Site Dev., Inc. v. R. Nahai & Sons, Inc., 299 Ga. App. 654, 683 S.E.2d 627 (2009); B-T Two, Inc. v. Bennett, 307 Ga. App. 649, 706 S.E.2d 87 (2011).

Purpose

Special finding required. — Where punitive damages are claimed, the trier of fact should first resolve from the evidence produced at trial whether an award of punitive damages should be made, and that finding should be made specially through an appropriate form of verdict, along with the other required findings. Conseco Fin. Servicing Corp. v. Hill, 252 Ga. App. 774, 556 S.E.2d 468 (2001).

Evidentiary Standard

Negligence inadequate to support punitive damage award.

Trial court did not err in granting summary judgment to a bank and a credit union, on claims of conversion, civil conspiracy and for attorney fees and punitive damages, as: (1) no probative evidence existed that the buyer received delivery of the check, and thus, it never became a holder of the instrument at issue or entitled to enforce it; (2) no evidence was presented that the bank and credit union acted in concert against the buyer; (3) no evidence of misconduct or bad faith on the part of the bank or the credit union was presented, and mere negligence was insufficient; but, the trial court properly found that a genuine issue of material fact existed as to whether the bank and the credit union were holders in due course and whether the check bore evidence of forgery or alteration so as to call into question its authenticity. Hartsock v. Rich's Emples. Credit Union, 279 Ga. App. 724, 632 S.E.2d 476 (2006).

Trial court did not err in granting partial summary judgment to an employer on a driver's negligent hiring claim because the driver failed to present any evidence in support of the driver's punitive damages claim that demonstrated the employer's independent negligence in the hiring, entrustment, supervision, or retention of an employee, who struck the driver's car while driving the employer's tractor-trailer; therefore, the negligent hiring claim was merely duplicative of the driver's negligence claim against the employee, for which the employer admitted responsibility under the doctrine of respondeat superior. Kelley v. Blue Line Carriers, LLC, 300 Ga. App. 577, 685 S.E.2d 479 (2009).

Culpable conduct required.

In accord with Troutman v. B.C.B. Co. See MDC Blackshear, L.L.C. v. Littell, 273 Ga. 169, 537 S.E.2d 356 (2000).

Because the issues of proximate cause under O.C.G.A. § 51-12-5.1(b) and intent were disputed and a customer failed to prove fraud, the trial court erred in finding as a fact that a drug substitution caused the customer's injuries; consequently, the trial court erred in denying the pharmacy's motion for summary judgment. Mableton Parkway CVS v. Salter, 273 Ga. App. 477, 615 S.E.2d 558 (2005).

Evidence supported a finding that landowners' actions in trespassing on a corporation's dam and creating a nuisance in plugging the weakened dam were wilfully taken in bad faith; therefore, attorney fees and punitive damages were authorized. Bishop Eddie Long Ministries, Inc. v. Dillard, 272 Ga. App. 894, 613 S.E.2d 673 (2005).

Wanton conduct is that which is so reckless or so charged with indifference to the consequences as to be the equivalent in spirit to actual intent. Craig v. Holsey, 264 Ga. App. 344, 590 S.E.2d 742 (2003), cert. denied, 543 U.S. 820, 125 S. Ct. 59, 160 L. Ed. 2d 29 (2004).

A finding of no specific intent to cause harm under O.C.G.A. § 51-12-5.1(g) did not preclude a finding of liability under a non-physical injury negligent retention claim because there was no inconsistency between a finding of willful or wanton acts directed toward an employee along with a finding of no specific intent to cause harm

in that the two inquiries were separate and distinct. Tomczyk v. Jocks & Jills Rests., LLC, 513 F. Supp. 2d 1351 (N.D. Ga. 2007).

Clear and convincing evidence.

Defendant's leaving the scene of a collision without even speaking to the other party, as mandated by statute, was an intentional and culpable act; such conduct demonstrated a conscious indifference to the consequences and an entire want of care as to the victim's well being permitting the jury to find that such conduct was of an aggravated and indifferent nature for purposes of imposing punitive damages. Langlois v. Wolford, 246 Ga. App. 209, 539 S.E.2d 565 (2000).

Court did not abuse its discretion in denying defendants' motion for a directed verdict on the issue of punitive damages in an action alleging that, contrary to their agreement, defendants aired television commercials in Georgia that contained before-and-after pictures of a customer's hair replacement treatments because some clear and convincing evidence supported the jury's award of punitive damages pursuant to O.C.G.A. § 51-12-5.1(b). Zieve v. Hairston, 266 Ga. App. 753, 598 S.E.2d 25 (2004).

In a tenant's action against the leasing agent of an apartment complex alleging that soot from an apartment heating system caused the tenant to suffer respiratory and lymph node problems, the agent's motion for a directed verdict was properly granted on the tenant's claim for punitive damages under O.C.G.A. § 51-12-5.1(b); the tenant failed to present clear and convincing evidence of a conscious indifference to consequences authorizing the imposition of punitive damages because it was not shown that the tenant knew or should have known that prolonged exposure to the soot would cause the personal injury for which the tenant sought recovery. Ambling Mgmt. Co. v. Purdy, 283 Ga. App. 21, 640 S.E.2d 620 (2006).

Insurer was entitled to summary judgment as to an insured's claim for punitive damages because the insured failed to adduce clear and convincing evidence, as required under O.C.G.A. § 51-12-5.1(b), that the insurer's actions in refusing to honor a settlement demand by an accident victim for the policy limit amounted to willful misconduct, fraud, malice, wantonness, oppression, or want of care where the insurer contended that the demand was not honored because the insurer was investigating whether the insured, who was not a named insured under the policy, was entitled to coverage as a permissive driver. Hulsey v. Travelers Indem. Co. of Am., 460 F. Supp. 2d 1332 (N.D. Ga. 2006).

In a case wherein the only tort that was properly submitted to the jury was the plaintiff's assertion of invasion of privacy against defendant, a psychiatrist, the trial court did not err by ruling that the evidence showed no willful or wanton conduct to support the plaintiff's claim for punitive damages and then granting a directed verdict on that claim in favor of the defendant, because the plaintiff's claim presented no evidence, much less no clear and convincing evidence, that raised a question whether the defendant's actions in sending three letters to other treating physicians of the plaintiff warranted punitive damages. Haughton v. Canning, 287 Ga. App. 28, 650 S.E.2d 718 (2007), cert. denied, No. S07C1869, 2008 Ga. LEXIS 157 (Ga. 2008).

In an action involving the judicial dissolution of a limited liability company, because there was clear and convincing evidence that a member of the company's actions showed willful misconduct, malice, fraud, wantonness, or oppression, the evidence was sufficient to support an award of punitive damages. Moses v. Pennebaker, 312 Ga. App. 623, 719 S.E.2d 521 (2011).

Due to overwhelming evidence that the defendant publisher reasonably and honestly (albeit mistakenly) believed that photographs were subject to the newsworthiness exception to the right of publicity, no reasonable jury could have found by clear and convincing evidence that punitive damages were warranted under O.C.G.A. § 51-12-5.1(b). The district court was instructed to vacate the jury's punitive damages award in the plaintiff mother's favor in plaintiff's claim for violation of the deceased daughter's right of privacy for the publication of nude photos post mortem. Toffoloni v. LFP Publ'g Group,

LLC, No. 11-12922, 2012 U.S. App. LEXIS 8810 (11th Cir. May 1, 2012), cert. denied, U.S. , 133 S. Ct. 792, 184 L. Ed. 2d 582 (2012) (Unpublished).

Actions sufficient to present jury question. — Restaurant cook's actions directed against plaintiff customers, including the use of profanity and a racial epithet, calling the police, and having the plaintiffs removed from the restaurant, were the sort of willful misconduct that suffices to present a jury question on whether plaintiffs were entitled to punitive damages. Middlebrooks v. Hillcrest Foods, Inc., 256 F.3d 1241 (11th Cir. 2001).

Trial court properly denied an insurance management company and its president's motion for directed verdict, pursuant to O.C.G.A. § 9-11-50, in an action by a contractor who was forced to pay for a subcontractor's employee's injuries due to the failure of the subcontractor to have workers' compensation insurance, as there was sufficient evidence of misrepresentations by the company and its president, and justifiable reliance by the contractor, to support the contractor's fraud and negligent misrepresentation claims; the company and its president had assured the contractor repeatedly that the subcontractor had adequate workers' compensation insurance for building purposes, although it did not, and based on the fraud by them, punitive damages pursuant to O.C.G.A. § 51-12-5.1(b) were properly presented to the jury for consideration. FitzSimons v. W. M. Collins Enters., Inc., 271 Ga. App. 854, 610 S.E.2d 654 (2005).

Because a corporation adduced evidence from which a jury could find that its competitor, the competitor's majority shareholder, and a newly formed company liable for procuring a breach of fiduciary duty, and because acting purposefully, with malice and the intent to injure, was an essential element of this tort, defendants were not entitled to judgment as a matter of law on the corporation's malice claims seeking punitive damages and attorney fees. Insight Tech., Inc. v. FreightCheck, LLC, 280 Ga. App. 19, 633 S.E.2d 373 (2006).

Summary judgment was properly denied on punitive damages claims in a parent's action arising out of an accusation by store employees that the parent's child stole from the store because issues of fact existed as to whether the employees acted with a wanton disregard of the child's rights under O.C.G.A. § 51-12-5.1(b). Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

As there was evidence that a dentist failed to perform diagnostic procedures, knew that dental implants inserted in a patient's mouth were not fitting properly, and yet used permanent cement to set them into position, the trial court erred in granting summary judgment to the dentist on the patient's claim for punitive damages of less than $250,000. Tookes v. Murray, 297 Ga. App. 765, 678 S.E.2d 209 (2009).

Partner, who sought punitive damages based upon another partner's actions, was not entitled to summary judgment because the evidence created a jury question over whether the investment bank partner acted with the specific intent to cause harm, and thus over whether the statutory cap should apply in the case. AAF-McQuay, Inc. v. Willis, 308 Ga. App. 203, 707 S.E.2d 508 (2011).

Threat of criminal prosecution sufficient. — A contractor's conduct in attempting to use the threat of criminal prosecution to pressure a client into paying a disputed bill met the standard for awarding the client punitive damages in the client's counterclaim for malicious prosecution. Gooch v. Tudor, 296 Ga. App. 414, 674 S.E.2d 331 (2009).

Purposeful action required in identity fraud cases. — Trial court properly granted summary judgment to the auto dealer, the mortgage broker, and the lender on the accused person's claim for punitive damages for repossessing the truck that had been fraudulently financed by another person in the accused person's name and then reporting that repossession to credit agencies that had the accused person's information before finally getting the repossession information deleted from the accused person's credit reports as the evidence did not show they purposefully acted to harm the accused

person. Blakey v. Victory Equip. Sales, 259 Ga. App. 34, 576 S.E.2d 38 (2002).

Employer's conduct was proper response in employee's claim of sexual harrasment by a co-worker. — Evidence did not support a claim by an employee against an employer of intentional infliction of emotional distress due to a co-employee's acts of sexual harassment directed at the employee, as the employer's conduct in response to the harassment was neither extreme or outrageous, nor malicious, willful, or wanton, based on the same test used for determination of punitive damages under O.C.G.A. § 51-12-5.1; rather, the employer responded to the employee's indication of sexual harassment by putting a ban on communications between the employees and by ultimately terminating the co-employee for a failure to adhere to that ban. Travis Pruitt & Assocs., P.C. v. Hooper, 277 Ga. App. 1, 625 S.E.2d 445 (2005).

No proof of intent to cause harm. — As there was no evidence a dentist acted with the specific intent to cause harm to a patient, as required under O.C.G.A. § 51-12-5.1(f)-(g) to support a claim for unlimited punitive damages, the patient's claim for punitive damages exceeding $250,000 was properly dismissed. Tookes v. Murray, 297 Ga. App. 765, 678 S.E.2d 209 (2009).

Product Liability

Punitive damages proper. — Award of punitive damages in a personal injury action arising from exposure to pesticides was proper because the evidence supported a finding that the extermination company displayed a conscious indifference to the possible infliction of personal injury on the company's customers as a result of their exposure to pesticides misapplied by extermination company technicians. Orkin Exterminating Co. v. Carder, 258 Ga. App. 796, 575 S.E.2d 664 (2002).

Trial court properly denied an automobile manufacturer's motion judgment notwithstanding the verdict on a grant of punitive damages, pursuant to O.C.G.A. § 51-12-5.1(b), in a products liability action; the evidence indicated that the manufacturer had been aware of faulty backseat latches for years prior to the accident, in which a latch failed and the seat flew forward, permanently paralyzing a child, and did nothing to remedy or warn customers of the problem. Ford Motor Co. v. Sasser, 274 Ga. App. 459, 618 S.E.2d 47 (2005).

Other Cases

Summary judgment properly denied as to invasion of privacy claim. — Summary judgment motion filed by employer was properly denied on an intentional infliction of emotional distress claim brought under the doctrine of respondeat superior by a group of female employees, after the employer installed a video surveillance system in the women's restroom in response to rumored drug use, placed a manager in charge of the system, and asked the manager to monitor the activity of the employees; there was no evidence that the manager acted solely for personal sexual gratification. Johnson v. Allen, 272 Ga. App. 861, 613 S.E.2d 657 (2005).

Specific intent requirement.

When an employer sought an award of punitive damages against an employee in an amount exceeding $250,000, there was a bright line rule requiring the employer to request both a charge on the employee's specific intent to cause harm and a separate finding of the employee's specific intent to cause harm by the trier of fact in order to avoid the $250,000 cap in O.C.G.A. § 51-12-5.1(g). Quay v. Heritage Fin., Inc., 274 Ga. App. 358, 617 S.E.2d 618 (2005).

Bright line rule regarding awarding punitive damages in excess of the cap in O.C.G.A. § 51-12-5.1(g) means that a failure to object to the absence or inadequacy of a specific intent charge or finding does not constitute a waiver of the error for the purpose of appellate review, and because a claimant for punitive damages bears the burden of meeting the procedural requirements of O.C.G.A. § 51-12-5.1(g), a verdict for punitive damages in excess of $250,000 may not stand unless the record reflects both a request to charge on specific intent to cause harm and a separate finding of specific intent to cause harm by the trier of fact. Quay v. Heritage Fin.,

Inc., 274 Ga. App. 358, 617 S.E.2d 618 (2005).

In a "road rage" suit against a supplier and a carrier involving an assault by a truck driver, the evidence did not support an award of punitive damages over $250,000 under O.C.G.A. § 51-12-5.1(f); it had not been alleged that the supplier, which defaulted, acted with the specific intent to cause harm, and such intent was not established by a showing of conscious indifference on the carrier's part. Aldworth Co. v. England, 286 Ga. App. 1, 648 S.E.2d 198 (2007).

Trial court did not err in refusing to limit the punitive damages award to $250,000, the statutory cap set forth in O.C.G.A. § 51-12-5.1(f) and (g), in a corporation's action against a former president alleging breach of fiduciary duty and misappropriation of corporate opportunity because the following evidence supported the jury's finding of specific intent to harm: (1) an employee who worked for both the corporation and a business that was formed by the president and by the owner of the corporation's competitor testified that the president warned the employee and other employees not to reveal their involvement with the business because "it would only be a detriment to you"; (2) the owner of the corporate competitor testified that the president had stated that the president had permission to work on a second factoring company; and (3) the corporation's owner testified that the corporation had no knowledge of the president's involvement in a second factoring business. Brewer v. Insight Tech., Inc., 301 Ga. App. 694, 689 S.E.2d 330 (2009), cert. denied, No. S10C0678, 2010 Ga. LEXIS 455 (Ga. 2010).

No punitive damages for trespass without compensatory damages awarded. — Trial court erred in awarding a grandfather punitive damages against a grandson for trespass, as punitive damages could not be awarded absent a compensatory damages award, even though injunctive relief was granted. Martin v. Martin, 267 Ga. App. 596, 600 S.E.2d 682 (2004).

Damages properly denied; conscious indifference not proven.

Truck repairer was properly granted a directed verdict under O.C.G.A. § 9-11-50 with respect to a truck owner's request for punitive damages as the repairer's acts did not amount to willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care that would raise the presumption of conscious indifference to the consequences pursuant to O.C.G.A. § 51-12-5.1(b). Puckette v. John Bailey Pontiac-Buick-GMC Truck, Inc., 311 Ga. App. 138, 714 S.E.2d 750 (2011).

Claim for damages fails. — Since punitive damages could only be awarded as damages additional to other damages, and because the medical director did not establish any other claim for damages in the medical director's suit for damages for the disclosure of the fact that the medical director tested positive for an infectious disease, the medical director's claim for punitive damages had to fail. Nelson v. Glynn-Brunswick Hosp. Auth., 257 Ga. App. 571, 571 S.E.2d 557 (2002).

Trial court erred in granting actual damages for orthodontic expenses, as well as punitive damages and attorney fees, to an ex-husband in a fraud claim against the ex-wife, arising from an allegations that the ex-wife fraudulently misrepresented that a former husband had abandoned the ex-wife's daughters, which the ex-husband later adopted, as the divorce decree and the adoption order were presumptively valid and in full force and effect, and accordingly, the ex-husband could not recover for expenses that the ex-husband was legally obligated to pay; although the ex-wife failed to respond to the complaint, the trial court erred in granting the ex-husband a default judgment under O.C.G.A. § 9-11-55(a) because the relief was not available to him, and as there was no actual damages awarded, there could be no punitive damages under O.C.G.A. § 51-12-5.1(b) and no attorney fees. Grand v. Hope, 274 Ga. App. 626, 617 S.E.2d 593 (2005).

Insured could not sustain a claim that the parent insurance company interfered with a policy issued by its subsidiary and induced the subsidiary to breach the policy because the parent company could not be a stranger to the subsidiary's contractual relations; therefore, the insured's claims for tortious interference with con-

tractual relations and punitive damages arising out of that alleged tortious interference were dismissed for failure to state a claim. Perry v. Unum Life Ins. Co. of Am., 353 F. Supp. 2d 1237 (N.D. Ga. 2005).

Construction worker's O.C.G.A. § 51-12-5.1(b) punitive damages claim against a boom manufacturer and two rental companies failed because the worker's underlying products liability claims failed, as there was no evidence that the manufacturer or the rental companies produced or placed into the stream of commerce the boom that injured the worker. McBride v. JLG Indus., No. 7:03-cv-118(HL), 2005 U.S. Dist. LEXIS 21713 (M.D. Ga. Sept. 20, 2005); Mosley v. JLG Indus., 2005 U.S. Dist. LEXIS 21782 (M.D. Ga. Sept. 20, 2005).

In an advertiser's suit alleging claims for fraud, breach of contract, gross negligence, and punitive damages in connection with a publisher and its sales agent's failure to ensure that the advertiser's business was listed in a telephone directory, the punitive damages claim failed under O.C.G.A. § 51-12-5.1 because the advertiser's underlying claims were dismissed on summary judgment. Integrated Pest Mgmt. Servs., LLC v. Bellsouth Adver. & Publ. Corp., No. 1:04-cv-2880-WSD, 2005 U.S. Dist. LEXIS 30000 (N.D. Ga. Nov. 16, 2005).

Because an executor's underlying claims of fraud, breach of fiduciary duty, and conversion against a brother and a wife were dismissed upon summary judgment, the executor's O.C.G.A. § 51-12-5.1(b) claim for punitive damages also had to be dismissed, as the executor no longer had any claims supporting actual damages. Rowland v. Rowland, 2005 U.S. Dist. LEXIS 30296 (N.D. Ga. Nov. 16, 2005).

Administrator's claim for punitive damages against an insurance company, which allegedly improperly denied insurance death benefits, was dismissed because Georgia law did not provide the administrator with a tort claim; since the administrator's tort claims were dismissed, the punitive damages claim under O.C.G.A. § 51-12-5.1 required dismissal. Garrett v. Unum Life Ins. Co. of Am., 427 F. Supp. 2d 1158 (M.D. Ga. 2005).

In a medical malpractice action, an executrix failed to support a claim for punitive damages related to a claim of abandonment, as the executor failed to present any expert testimony that there was a reasonable degree of medical certainty the decedent would have survived, even if the doctor or another qualified surgeon had been at the hospital when the decedent began to bleed internally; thus, the trial court properly granted the doctor a directed verdict as to both claims. King v. Zakaria, 280 Ga. App. 570, 634 S.E.2d 444 (2006).

Although punitive damages were available for fraud claims, because the court had dismissed the consumers' fraud claim for failure to plead fraud with sufficient particularity, there was no claim remaining in the case to support a claim for punitive damages under O.C.G.A. § 51-12-5.1(b); therefore, the claim for punitive damages was dismissed. Danielson v. DBM, Inc., 2006 U.S. Dist. LEXIS 52746 (N.D. Ga. July 31, 2006).

Penalty was assessed against two customers for bringing a frivolous appeal as their punitive damages claim based on a salesperson placing an acrylic riser back in its original position on a counter without a warning after it had fallen on a customer's toe was without a factual or legal support since placing the acrylic riser on the counter was not willful, malicious, or designed to cause injury to others, and no person was injured when the riser was placed back on the counter after it fell and struck the customer's toe. Kurtz v. Brown Shoe Co., 281 Ga. App. 706, 637 S.E.2d 111 (2006).

Because an employee chose to pursue punitive damages under O.C.G.A. § 51-12-5.1 rather than O.C.G.A.§ 51-2-6, the employee was not entitled to punitive damages on a claim for negligent retention due to the fact that the jury specifically found that the employee had not suffered a physical injury. A finding of physical injury was required for punitive damages under O.C.G.A. § 51-12-5.1. Tomczyk v. Jocks & Jills Rests., LLC, 513 F. Supp. 2d 1351 (N.D. Ga. 2007).

In a boat buyer's suit alleging negligence by defendants, a marina, a boat

yard, and the seller of the boat in connection with a fire that caused the buyer to sustain severe burns, the buyer's claims for punitive damages under O.C.G.A. § 51-12-5.1(b) failed since there was no evidence that defendants acted with willful misconduct or recklessness in the installation of an alternator that may have been defective or in using an automated fuel pump to refuel the boat. Muhs v. River Rats, Inc., 586 F. Supp. 2d 1364 (S.D. Ga. 2008).

Employee who cut a tree that fell on a landscaper's truck was properly granted summary judgment as to the landscaper's claim for punitive damages. Because the employee, who had eight years' experience in removing trees, believed the tree could be cut so the tree would fall away from the road, and used an anchor rope to control the tree's descent, no rational fact finder could have found by clear and convincing evidence that the employee intentionally disregarded the rights of others. Wardlaw v. Ivey, 297 Ga. App. 240, 676 S.E.2d 858 (2009).

Like the driver who was speeding on wet roads and had consumed alcohol before the crash, the evidence the executor adduced against the driver was that the driver drove at excessive speeds, carried a slightly overweight load, and drove despite knowing that the driver's blood sugar situation was not being properly controlled. Those facts did not form the basis of a pattern and policy of dangerous driving and were more akin to violating rules of the road; therefore, the court granted the driver, the trucking company, the corporation, and the insurance company's motion for summary judgment as to punitive damages under O.C.G.A. § 51-12-5.1(b). Lewis v. D. Hays Trucking, Inc., No. 1:08-cv-01904-JOF, 2010 U.S. Dist. LEXIS 28035 (N.D. Ga. Mar. 22, 2010).

No proof of entitlement to punitive damages.

Evidence that a cell phone company erroneously charged its customers taxes and delayed reimbursement for several months was insufficient to establish a material issue of fact as to the customers' entitlement to punitive damages. Taylor v. Powertel, Inc., 250 Ga. App. 356, 551 S.E.2d 765 (2001).

Where injured parties sought punitive damages from a motorist who collided with their vehicle because the motorist was a minor whose license did not allow the minor to drive after 1:00 a.m., and the collision occurred after 1:00 a.m., the recovery of punitive damages was not allowed because the time at which the motorist was driving did not proximately cause the collision, and the minor's action was not part of a pattern or policy of dangerous driving, such as driving while intoxicated or excessive speeding, which could justify the imposition of punitive damages, under O.C.G.A. § 51-12-5.1(b). Brooks v. Gray, 262 Ga. App. 232, 585 S.E.2d 188 (2003).

Spouse of a decedent worker presented no evidence that the corporations engaged in the sort of conduct that would warrant an imposition of punitive damages because the spouse's suit was based on a simple negligence theory; because the spouse failed to satisfy the statutory requirements in O.C.G.A. § 51-12-5.1, the spouse's claim for punitive damages did not succeed. Clark v. Roberson Mgmt. Corp., No. 5:03CV274 (DF), 2005 U.S. Dist. LEXIS 46972 (M.D. Ga. Jan. 11, 2005).

Corporation, the employee, and the insurance company's motion for summary judgment on the punitive damages claim under O.C.G.A. § 51-12-5.1(b) was granted because: (1) the injured individual had not alleged any facts that show that the employee acted maliciously; and (2) the employee's speeding tickets were not such numerous and serious violations as to suggest that the collision resulted from a pattern or policy of dangerous driving. Ballard v. Keen Transp., Inc., No. 4:10-cv-54, 2011 U.S. Dist. LEXIS 5487 (S.D. Ga. Jan. 19, 2011).

Damages properly awarded; conscious indifference proven.

Evidence supported a finding that defendant company acted with reckless disregard of plaintiff's welfare by allowing him to sit in jail as a result of its failure to pay its own charges for false alarms. E-Z Serve Convenience Stores v. Crowell, 244 Ga. App. 43, 535 S.E.2d 16 (2000).

Award of punitive damages under O.C.G.A. § 51-12-5.1(b) to the injured

party in the trover action was supported by the evidence, where the bank wrongfully repossessed the injured party's trailer under the assumption that it was the injured party's son's, it failed to follow standard banking practice requiring that an attempt be made to identify the secured vehicle correctly before repossessing it, and the bank did not hold title to the trailer, but merely had a financing statement granting it a security interest in the injured party's son's equipment. Gateway Bank & Trust v. Timms, 259 Ga. App. 299, 577 S.E.2d 15 (2003).

When a construction company promised to remedy a problem with standing water in the backyard of a house it sold to a homeowner, which was a problem it had created when it removed soil from the yard, but, after two years, told the homeowner it had no intention of taking care of the problem, an award of punitive damages was proper, under O.C.G.A. § 51-12-5.1(b), as the evidence showed clearly and convincingly that the company refused to acknowledge the problem and the problem took a physical toll on the elderly homeowner. Bowen & Bowen Constr. Co. v. Fowler, 265 Ga. App. 274, 593 S.E.2d 668 (2004).

After a company established that a former agent of the company solicited the company's customers for a competing enterprise during the tenure of the agent's employment, such conduct demonstrated the type of willful misconduct contemplated by O.C.G.A. § 51-12-5.1(b) to warrant an award of punitive damages, but the award was limited to half of the amount awarded as damages since the agent's conduct did not appear to be calculated to harm the company and the agent's competing enterprise was not a robust operation and was suffering a loss of business as a result of the case. KEG Techs., Inc. v. Laimer, 436 F. Supp. 2d 1364 (N.D. Ga. 2006).

Award of punitive damages was authorized in a trespass action filed against owners of property by the holder of an easement over their property because the evidence authorized a finding that the owners participated in repeated trespasses to the holder's property; under O.C.G.A. § 51-12-5.1(b), punitive damages could be awarded in tort actions in which willful misconduct was proven by clear and convincing evidence, and because trespass was an intentional act, a willful repetition of trespass authorized the claim for punitive damages. Paine v. Nations, 283 Ga. App. 167, 641 S.E.2d 180 (2006).

Jury properly found that a corporation that manufactured carbon black and permitted its smokestacks to spew an oily substance onto adjacent properties over a course of years with notice but without effectively remedying the problem evinced a specific intent to cause harm, overcoming the punitive damage cap in O.C.G.A. § 51-12-5.1(f), (g). Action Marine, Inc. v. Cont'l Carbon, Inc., 481 F.3d 1302 (11th Cir. 2007).

In a "road rage" suit against a carrier involving an assault by a truck driver, limited punitive damages under O.C.G.A. § 51-12-5.1(b) were authorized against the carrier. A finding of conscious indifference was supported by evidence that the carrier violated federal regulations by not obtaining an address history for the driver, that it knew the driver had been fired from the driver's last job after an accident, that the carrier knew that the driver had not disclosed numerous driving citations, and that the carrier had not investigated any of the infractions. Aldworth Co. v. England, 286 Ga. App. 1, 648 S.E.2d 198 (2007).

Evidence supported an award of punitive damages under O.C.G.A. § 51-12-5.1(b) as it was undisputed that a developer trespassed on an owner's property, causing a continuing nuisance of run-off and erosion, that the developer knew of the problems the developer created, and that the developer showed a conscious indifference as the developer made no attempt to correct the problems. Wildcat Cliffs Builders, LLC v. Hagwood, 292 Ga. App. 244, 663 S.E.2d 818 (2008).

Damages properly denied; lack of clear and convincing evidence. — The trial court did not err in granting j.n.o.v. to the defense on the issue of punitive damages in an action arising from an incident in which a portion of needle broke off during a tonsillectomy and a portion of the needle lodged in a child's tonsil fossa since

testimony by the child's mother that a nurse stated that the needle remaining in the child's throat was "microscopic" in size and that this occurrence was common was not clear and convincing, given that it was contradicted by the testimony of the nurse and the physician, as well as the physician's notes of the conversation. Kodadek v. Lieberman, 247 Ga. App. 606, 545 S.E.2d 25 (2001).

Evidence of employee's conviction could not be presented. — Where an employer was liable under respondeat superior for the tort of its employee and punitive damages were sought, the employer had no right to present as mitigative evidence the conviction of its employee; a corporation had no right to present evidence of the conviction and fine of its employee who allegedly assaulted one of the corporation's customers. May v. Crane Bros., Inc., 276 Ga. 280, 576 S.E.2d 286 (2003).

Fraud. — The nature of fraud is such that it includes within its elements the intent to commit harm to the victim under O.C.G.A. § 51-12-5.1(f), justifying punitive damages., overruled in part, Time Warner Entm't Co. v. Six Flags Over Ga., L.L.C., 254 Ga. App. 598, 563 S.E.2d 178 (2002).

A trial court erred in granting summary judgment to an auto dealership in a purchaser's suit asserting fraud and violations of Georgia's Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., with regard to the purchase of a vehicle as genuine issues of material fact existed as to each element, including whether the purchaser was entitled to punitive damages under O.C.G.A. § 51-12-5.1(b) for the fraud. Johnson v. GAPVT Motors, Inc., 292 Ga. App. 79, 663 S.E.2d 779 (2008).

Personal representative's wrongful conveyance of the estate's primary asset, a house, to the personal representative was both a breach of fiduciary duty and fraud, entitling the beneficiary to punitive damages under O.C.G.A. § 51-12-5.1(b). In re Estate of Zeigler, 295 Ga. App. 156, 671 S.E.2d 218 (2008).

Insurance fraud. — Where the court found that a Chapter 7 debtor, as owner of an insured, knowingly and intentionally submitted fraudulent claims to the insurer in the amount of $7,761, the insurer was entitled to punitive damages in the amount of $25,000, payment of which would affect the insurer's lifestyle, yet the debtor should have a realistic chance of paying the amount over time. Cincinnati Ins. Co. v. Porter (In re Porter), No. 05-44583-PWB, 2007 Bankr. LEXIS 2185 (Bankr. N.D. Ga. May 23, 2007).

Dischargeability in bankruptcy.

After a state court awarded a creditor punitive damages in the creditor's suit against debtors for actions that showed "willful misconduct, malice, fraud, wantonness, oppression, or entire want of care," then even assuming arguendo that a finding that the debtors acted with an "entire want of care" would satisfy 11 U.S.C. § 523(a)(6), because the state court did not identify on which of the six disjunctive parts of O.C.G.A. § 51-12-5.1(b), or combinations thereof, that the court based the court's decision; thus, a bankruptcy court could not determine as a matter of law that the state court judgment satisfied the requirements of 11 U.S.C. § 523(a)(6). Jefferson v. Hedd-Williams (In re Hedd-Williams), No. 10-6091-JRS, 2011 Bankr. LEXIS 2297 (Bankr. N.D. Ga. Mar. 30, 2011).

Not allowed for breach of contract.

Because a general contractor's action involved only contract claims, it could not claim relief in the form of punitive damages under O.C.G.A. § 51-12-5.1. Apac-Southeast, Inc. v. Coastal Caisson Corp., 514 F. Supp. 2d 1373 (N.D. Ga. 2007).

Failure to warn of obstruction in roadway. — Allegations that a corporation's employees had negligently, recklessly, wantonly, and with a conscious disregard for the consequences failed to warn a driver of an obstruction in the roadway that they had created, which were admitted by the corporation through its default, were sufficient to support punitive damages under O.C.G.A. § 51-12-5.1. COMCAST Corp. v. Warren, 286 Ga. App. 835, 650 S.E.2d 307 (2007), cert. denied, 2008 Ga. LEXIS 82 (Ga. 2008).

Punitive damages against automobile insurer. — Evidence that an insurer took claimant's vehicle without the claimant's permission, demanded storage fees

after wrongfully taking the vehicle from a location that was not charging storage, and the callous disregard of claimant's rights as shown by an adjuster's letters and deposition testimony, was sufficient to present a jury question regarding punitive damages. Jerrell v. Classic Ins. Co., 246 Ga. App. 565, 541 S.E.2d 53 (2000).

Punitive damages of $1 million not excessive. — After a truck driver punched the plaintiff in the face during a road rage incident and the employer, by defaulting, admitted acting recklessly in allowing the truck driver to drive, a punitive damages award of $1 million, or 1.3 times compensatory damages, was not so excessive as to deny the employer due process; therefore, the employer was not entitled to new trial. Aldworth Co. v. England, 276 Ga. App. 31, 622 S.E.2d 367 (2005), aff'd in part and rev'd in part, 281 Ga. 197, 637 S.E.2d 198, 2006 Ga. LEXIS 883 (2006).

Drunk driving supporting punitive damages. — Evidence that the defendant had a high level of intoxication only a short time after the collision gave rise to the reasonable inference that defendant was also intoxicated at the time of the collision and, coupled with a past history of drinking and D.U.I., gave rise to the reasonable inference that defendant had been drinking and driving when the collision occurred and that defendant sought to conceal such conduct by flight; thus, driving under the influence was an aggravated conduct supporting punitive damages. Langlois v. Wolford, 246 Ga. App. 209, 539 S.E.2d 565 (2000).

Driving without license alone did not support punitive damages. — Trial court properly granted summary judgment for a motorist on an injured person's claim for punitive damages sought on the sole ground that the motorist was knowingly driving without a valid driver's license at the time of the accident; driving without a license was not the proximate cause of the accident and there was no pattern or policy of dangerous driving. Doctoroff v. Perez, 273 Ga. App. 560, 615 S.E.2d 623 (2005).

Employer not vicariously liable for punitive damages when employee drunk. — In a negligence action, a truck driver's employer could not be vicariously liable for punitive damages under O.C.G.A. § 51-12-5.1(f) as the truck driver acted under the influence of alcohol when the truck driver was involved in a collision with an automobile driver. Am. Material Servs. v. Giddens, 296 Ga. App. 643, 675 S.E.2d 540 (2009).

No punitive damages against server of alcohol. — Punitive damages are not authorized against a server of alcohol under O.C.G.A. § 51-12-5.1(f). O.C.G.A. § 51-12-5.1(f) provides that if the defendant acted or failed to act while under the influence of alcohol, there shall be no limitation regarding the amount which may be awarded as punitive damages against such an active tortfeasor, however, such damages shall not be the liability of any defendant other than an active tortfeasor, that is the defendant acting under the influence of alcohol. Capp v. Carlito's Mexican Bar & Grill #1, Inc., 288 Ga. App. 779, 655 S.E.2d 232 (2007), cert. denied, 2008 Ga. LEXIS 317 (Ga. 2008).

Arbitrator did not exceed authority by awarding punitive damages based on findings that the defendants violated express terms of a security agreement expressly prohibiting the sale, transfer, or disposal of the collateral without the prior written consent of the plaintiff. Faiyaz v. Dicus, 245 Ga. App. 55, 537 S.E.2d 203 (2000).

Reduction of award to authorized maximum. — Trial court correctly reduced an award to the maximum authorized by O.C.G.A. § 51-12-5.1(g) after a party failed to fulfill the requirements of the bright line rule requiring both a charge on specific intent to cause harm and a separate finding of specific intent to cause harm by the trier of fact. Scott v. Battle, 249 Ga. App. 618, 548 S.E.2d 124 (2001).

Tortfeasor should not profit from wrongdoer. — Trial court did not abuse its discretion in refusing to overrule the jury's award of punitive damages in its entirety where the award achieved the legitimate goal of depriving the tortfeasor of the wrongdoer's profitability. Scott v. Battle, 249 Ga. App. 618, 548 S.E.2d 124 (2001).

Trusts. — In a breach of trust action, the trial court erred in denying defendant brothers' motion to reduce damages with respect to the punitive damage award because the jury specifically found that the brothers did not act with the specific intent to cause harm to the sister; the judgment could be affirmed only on the condition that the sister agreed to strike therefrom the award of punitive damages in excess of $250,000. Sims v. Heath, 258 Ga. App. 681, 577 S.E.2d 789 (2002) (Unpublished).

Willful, wrongful conversion of property. — Award of $50,000 in punitive damages for a lessee's willful conversion of a leased trailer was not excessive, where clear and convincing evidence showed lessee's willful misconduct in refusing to return the trailer, concealing it, and misrepresenting its location to the lessor. Lawrence v. Direct Mortg. Lenders Corp., 254 Ga. App. 672, 563 S.E.2d 533 (2002).

Building in violation of ordinance resulting in nuisance. — Where the evidence showed that a homebuilder, with willful misconduct and indifference to the consequences, built a house too close to a homeowner's home, in violation of zoning laws, the evidence supported the jury's finding of a nuisance and the award of punitive damages. Segars v. Cleland, 255 Ga. App. 293, 564 S.E.2d 874 (2002).

Apartment owners. — In a wrongful death action against an apartment complex based on the strangulation of a tenant by a maintenance worker, a directed verdict on the issue of punitive damages was properly denied because there was sufficient clear and convincing evidence to create a jury issue on whether the complex displayed a conscious indifference to the possibility that an under-investigated employee was involved in a series of crimes that could foreseeably lead to violent results for one of its tenants. TGM Ashley Lakes, Inc. v. Jennings, 264 Ga. App. 456, 590 S.E.2d 807 (2003).

Punitive damages awarded in trespass case. — Jury was entitled to award a property owner compensatory and punitive damages pursuant to O.C.G.A. §§ 51-9-3 and 51-12-5.1 because a willful trespass occurred when a neighbor directed the construction of a sewer lateral across the owner's property to tie into the owner's sewer line when the neighbor knew that the neighbor had neither a written easement nor permission from the owner to do so. LN West Paces Ferry Assocs., LLC v. McDonald, 306 Ga. App. 641, 703 S.E.2d 85 (2010).

Outdoor fireplace and resultant smoke raises issues of punitive damages. — Trial court erred by granting neighbors' motion for summary judgment in property owners' action to recover damages arising from smoke emanating from the neighbors' outdoor fireplace because there was some evidence of acts by the neighbors that could allow a jury to consider a claim for punitive damages; the neighbors continued to use the fireplace after the owners notified the neighbors that the fireplace caused smoke to enter the owners' home, resulting in physical discomfort to the owners and interfering with the owners' use and enjoyment of the owners' home. Weller v. Blake, 315 Ga. App. 214, 726 S.E.2d 698 (2012).

Legal malpractice. — Trial court properly awarded partial summary judgment to an attorney because the damages flowing from the client's separate claim that the attorney fraudulently misrepresented the attorney's expertise or experience to induce employment were no different from the damages flowing from the client's claim of alleged legal malpractice against the attorney. Therefore, even if there had been evidence to support the allegation of fraud, there would have been no separate cause of action for fraud apart from the malpractice claim, but simply a claim for the award of punitive damages based on fraud as an aggravating circumstance in the malpractice claim. Griffin v. Fowler, 260 Ga. App. 443, 579 S.E.2d 848 (2003).

Where plaintiff patient sued defendant manufacturer of a surgically implanted medical device alleging design defects, breach of warranty, failure to warn of risks, and breach of contracts to pay for surgeries, manufacturer's motion for summary judgment on issue of patient's ability to recover punitive damages under O.C.G.A. § 51-12-5.1 was denied because the patient testified that manufacturer's misrepresentations that it would pay for

third surgery induced the patient to undergo additional surgery, and relying on the representations, the patient incurred additional medical expenses that manufacturer refused to pay, which exposed the patient to financial ruin. Trickett v. Advanced Neuromodulation Sys., 542 F. Supp. 2d 1338 (S.D. Ga. 2008).

Trial court did not err in awarding summary judgment to an attorney and a law firm in a former client's legal malpractice action seeking punitive damages because there was no evidence from which a jury could properly conclude that an award of punitive damages was warranted; although the client pointed to evidence that the attorney could have breached the standard of care, that evidence did not show anything more than, at worst, gross negligence. Duncan v. Klein, 313 Ga. App. 15, 720 S.E.2d 341 (2011).

Financial records of law firm against which punitive damages sought. — When the trial court determined that jury issues remained as to a claim for punitive damages against a law firm, the trial court abused the court's discretion in denying production of any of the law firm's financial records until after the jury rendered the jury's verdict. Smith v. Morris, Manning & Martin, LLP, 293 Ga. App. 153, 666 S.E.2d 683 (2008).

Insurer not obligated to defend its insured in action requesting punitive damages. — Where an amended complaint sought punitive damages, describing acts and omissions as willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences and their effects, an insurer was not obligated to defend its insured in such action. Ga. Farm Bureau Mut. Ins. Co. v. Hall County, 262 Ga. App. 810, 586 S.E.2d 715 (2003).

Punitive damages proper against real estate broker. — When a business broker's client sought punitive damages against the broker for filing a lien against the client's business, which was based on a false document, sufficient evidence supported the jury's award of such damages, under O.C.G.A. 51-12-5.1(b), as undisputed evidence showed the broker intentionally altered and then filed a sales agreement with a financing statement to falsely reflect that the broker was a party to the sales agreement. Bienert v. Dickerson, 276 Ga. App. 621, 624 S.E.2d 245 (2005).

Breach of fiduciary duty as executor of estate. — Beneficiaries of a will sued the decedent's grandchild for conversion of stock the beneficiaries alleged was intended to be part of the decedent's estate; as the jury found the stock was not a gift, the jury necessarily found that the stock was entrusted to the grandchild as a purported co-executor. The grandchild's breach of fiduciary duty supported an award of punitive damages to the beneficiaries under O.C.G.A. § 51-12-5.1(b). Bunch v. Byington, 292 Ga. App. 497, 664 S.E.2d 842 (2008).

Punitive damages to make plaintiff whole improper. — A customer sued a company for falsely reporting that the customer did not pay a bill, which damaged the customer's credit rating. As the trial court's written judgment contained no explicit findings that the company acted willfully, maliciously, or with conscious indifference—requirements for a punitive damage award under O.C.G.A. § 51-12-5.1(b)—and the trial court orally stated the court awarded punitive damages to make the customer whole, which was improper under § 51-12-5.1(c), that award could not stand. Infinite Energy, Inc. v. Cottrell, 295 Ga. App. 306, 671 S.E.2d 294 (2008).

Defamation and breach of fiduciary claims supported punitive damages. — In a suit brought by a golf course development company against two other members of a limited liability company and a housing authority, the trial court erred by dismissing the golf course development company's claim for punitive damages since the company's additional claims of breach of fiduciary duty and defamation supported such damages, and the company alleged that the other two members of the limited liability company behaved maliciously, in bad faith, and with reckless disregard for the legality of their actions when those entities negotiated the golf course development out of the project. Perry Golf Course Dev., LLC v.

Hous. Auth., 294 Ga. App. 387, 670 S.E.2d 171 (2008).

Malicious prosecution. — A contractor's using the threat of criminal prosecution in an attempt to pressure a property owner into paying a disputed bill, which resulted in the owner's being arrested and jailed, supported an award of punitive damages under O.C.G.A. § 51-12-5.1(b). Gooch v. Tudor, 296 Ga. App. 414, 674 S.E.2d 331 (2009).

Punitive damages improper in investor's summary judgment against corporation. — Because a corporation, the corporation's chief executive officer, and the corporation's chief financial officer did not demonstrate that they were entitled to judgment as a matter of law on an inventor's claims for money had and received and for conversion, summary judgment dismissing the inventor's claims for punitive damages and litigation expenses based on those causes of action was improper. Fernandez v. WebSingularity, Inc., 299 Ga. App. 11, 681 S.E.2d 717 (2009).

Fact that a creditor won an award of punitive damages under O.C.G.A. § 51-12-5.1(f) afforded an insufficient basis for summary judgment on the creditor's claim that the obligation was nondischargeable in a Chapter 7 case because an "entire want of care," which was one possible basis for the judgment, was distinguishable from the "intent" or "willfulness" required to establish a right to nondischargeability under 11 U.S.C. § 523(a)(6). Terhune v. Houser (In re Houser), 458 B.R. 771 (Bankr. N.D. Ga. 2011).

Punitive damages for tortuous interference with resale of equipment. — Debtor established the debtor was entitled to damages for tortious interference with the debtor's resale of medical equipment from defendant manufacturers. Bad faith under O.C.G.A. § 13-6-11 required more than bad judgment or negligence, but debtor established a dishonest purpose and breach of known duty, O.C.G.A. § 51-12-5.1(b). Bailey v. Hako-Med USA, Inc. (In re Bailey), No. 09-4002, 2010 Bankr. LEXIS 6300 (Bankr. S.D. Ga. Nov. 16, 2010).

Procedure

Multiple causes of action.

Because the appeals court found that other intentional tort claims survived summary judgment which would authorize the imposition of punitive damages if the jury were to find that a retailer and its employees acted with a wanton disregard of a nine-year-old child's rights, the trial court did not err by denying summary judgment on these grounds. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Conflict with federal rule for pleading. — Because O.C.G.A. § 51-12-5.1(d)(1) unavoidably conflicted with Fed. R. Civ. P. 54(c) on the procedural matter of whether the plaintiffs in a breach of contract suit that also alleged an independent tort, the unauthorized excavation and removal of dirt from another person's land, were required to plead punitive damages in the complaint, a federal district court sitting in diversity applied Rule 54(c) and held that punitive damages need not be specifically pleaded; therefore, the court denied plaintiffs' motion to amend their complaint. Toler v. Engelhard Corp., No. 5:04-CV-45 (DF), 2006 U.S. Dist. LEXIS 65526 (M.D. Ga. Sept. 14, 2006).

Bifurcated trial.

In a suit brought by a biological father to recover one-half of the proceeds of a settlement of a wrongful death action arising out of the death of a son, which the father brought against that child's mother and others, the trial court abused its discretion in bifurcating the trial in the manner chosen since the trial court did not follow any of the procedures set forth in O.C.G.A. 51-12-5.1 regarding punitive damages; secondly, the manner of bifurcation unfairly limited the father's right of cross-examination regarding post-death facts involving allegations by the father that the child's mother and the others took steps to conceal the recovery and to otherwise defraud the father. Bolden v. Ruppenthal, 286 Ga. App. 800, 650 S.E.2d

331 (2007), cert. denied, 2007 Ga. LEXIS 756 (Ga. 2007).

Severance required. — Statute required that issues of the liability for punitive damages and the amount of punitive damages be severed; thus, the trial court did not abuse its discretion in severing those issues in the customer and spouse's case against the pharmacist and pharmacy for dispensing the wrong drug to the customer. Moresi v. Evans, 257 Ga. App. 670, 572 S.E.2d 327 (2002).

Standard of proof of specific intent to harm. — Trial court did not err in instructing jury that the jury was permitted to award unlimited damages if it found by a preponderance of the evidence that there was a specific intent to harm, as the applicable statute did not mention a specific standard of proof and, thus, the common law burden of proof in cases involving punitive damages applied. Kothari v. Patel, 262 Ga. App. 168, 585 S.E.2d 97 (2003).

Instruction as to "clear and convincing evidence".

Because an owner and the owner's agent did not object to the trial court's failure to give a certain jury instruction, because their liability had already been established as a matter of law by way of their default, and because they failed to show harm resulting from the trial court's failure to define the clear and convincing evidence standard in O.C.G.A. § 51-12-5.1(b), they failed to preserved their claims on appeal in accordance with O.C.G.A. § 5-5-24(a). Waller v. Rymer, 293 Ga. App. 833, 668 S.E.2d 470 (2008).

Instruction and finding on specific intent on conspiracy count. — The trial court did not err in failing to limit the amount of the punitive damages award to $250,000 because the jury was specifically instructed that for the plaintiff to recover damages on a conspiracy count plaintiff must demonstrate that the defendant acted with the specific intent to drive plaintiff out of business and the jury's response on a special verdict form was tantamount to a finding that the defendant had acted with specific intent to cause harm to the plaintiff. Alta Anesthesia Assocs. of Ga., PC v. Gibbons, 245 Ga. App. 79, 537 S.E.2d 388 (2000).

An award of punitive damages could not be affirmed, etc.

In an employer's suit against a former employee for breach of fiduciary duty, and other claims, the jury's award of $650,000 in punitive damages could not be affirmed because there was no evidence in the record that the employer sought a charge on specific intent to cause harm or that the jury made a separate finding of specific intent to cause harm, and, as a result, the statutory cap of such an award to $250,000 could not be exceeded. Quay v. Heritage Fin., Inc., 274 Ga. App. 358, 617 S.E.2d 618 (2005).

Denial of punitive damages award erroneous.

Where defendants constructed a drainage system, through a dry stream bed, which concentrated and directed water onto plaintiff's property and they were on notice of a water discharge problem even before the stream bed was constructed, but never acted to abate it, this was sufficient evidence of "conscious indifference" to authorize a jury to award punitive damages and the trial court's grant of a motion for directed verdict on the issue of punitive damages was erroneous. Baumann v. Snider, 243 Ga. App. 526, 532 S.E.2d 468 (2000).

Trial court erred in various ways. — Trial court erred when the court denied a bank's motion for a new trial in a fraud case because the amount of damages awarded was excessive in that the evidence adduced at trial did not authorize the jury's award of $100,000 against the bank because the suing construction company alleged and proved only economic harm in an amount substantially less than that award, namely $9,400 via a materialman's lien, and renovation expenses in the amount of $23,000. Further, the jury's award of an additional $55,000 against the bank as punitive damages was erroneous since there was no charge on punitive damages, let alone proper guidance on the clear and convincing evidence required; the verdict form did not pose the question of punitive damages except by quotation of O.C.G.A. § 51-12-5.1(f), which required the jury to find specific intent to cause harm before the jury could award punitive damages in excess of

$250,000; and the proceedings were not properly bifurcated. First Southern Bank v. C & F Servs., 290 Ga. App. 304, 659 S.E.2d 707 (2008).

Summary judgment.

Summary judgment in favor of defendants was erroneous where plaintiffs presented evidence of excessive stormwater runoff and sediment deposit, flooding of their property, and pollution of their ponds directly from defendant developer's subdivision and that they repeatedly asked the developers to correct the problems. Tyler v. Lincoln, 272 Ga. 118, 527 S.E.2d 180 (2000).

Because there was no error in the trial court's grant of summary judgment on plaintiff's breach of fiduciary duty claim, likewise, summary judgment on plaintiff's punitive damages claim was appropriate because that claim was dependent upon the merits of the breach of fiduciary duty claim. Nelson & Hill, P.A. v. Wood, 245 Ga. App. 60, 537 S.E.2d 670 (2000).

Evidence of circumstances of aggravation or outrage was sufficient to defeat a motion for summary judgment on punitive damages. Schoenbaum Ltd. Co., LLC v. Lenox Pines, LLC, 262 Ga. App. 457, 585 S.E.2d 643 (2003).

Copyright owner's claim for punitive damages for an unfair competition claim was not appropriate under O.C.G.A. § 51-12-5.1 because the record contained very little evidence of willful misconduct, malice, fraud, wantonness, oppression, or conscious indifference and further whether the customer's actions were willful, wanton, or malicious to sustain a claim for punitive damages was an issue for a jury and not for summary judgment. SCQuARE Int'l, Ltd. v. BBDO Atlanta, Inc., 455 F. Supp. 2d 1347 (N.D. Ga. 2006).

Fact questions regarding whether a mortgagee intended to cause harm when it initiated a foreclosure proceeding against mortgagors precluded summary judgment regarding whether any punitive damages that might be awarded to the mortgagors on their attempted wrongful foreclosure claim would be capped at $250,000 pursuant to O.C.G.A. § 51-12-5.1(g); the mortgagors alleged that the mortgagee acted with a conscious disregard of the consequences by initiating a foreclosure action even though the mortgagors' loan was not in default. Hauf v. HomEq Servicing Corp., No. 4:05-CV-109 (CDL), 2007 U.S. Dist. LEXIS 9439 (M.D. Ga. Feb. 9, 2007).

Absent a confidential relationship between a lienholder and a prospective buyer of a vehicle subject to a lien, and absent any duty on the lienholder to disclose any problems with the vehicle's title to the buyer, the lienholder was properly granted summary judgment on the buyer's negligence, fraudulent concealment, and derivative claim for punitive damages. Lilliston v. Regions Bank, 288 Ga. App. 241, 653 S.E.2d 306 (2007), cert. denied, 2008 Ga. LEXIS 275 (Ga. 2008).

Facts not warranting punitive damages.

In an action for negligence resulting in an automobile collision causing injuries, the trial court did not err in granting defendant's motion for partial summary judgment on the issue of punitive damages since there was no evidence that defendant caused the collision through a "pattern or policy of dangerous driving." Miller v. Crumbley, 249 Ga. App. 403, 548 S.E.2d 657 (2001).

Punitive damages claim required to be submitted to the jury. — Trial court erred in ruling that a camp's punitive damages issue could not be presented to the jury because the evidence presented a material question as to whether a marina's trespass and nuisance onto the camp's property was knowing, willful, and a conscious indifference to the property rights of the camp; thus, the issue regarding the camp's claim for punitive damages was required to be submitted to the jury. Camp Cherokee, Inc. v. Marina Lane, LLC, 316 Ga. App. 366, 729 S.E.2d 510 (2012).

Evidence relating to attorneys' fees and litigation expenses, etc.

Injured party failed to show that the injured party was justified in seeking punitive damages or attorney fees from a welder based on a difficult welding job because the case did not involve special circumstances of aggravation or outrage; further, the injured party failed to show that there was information that led the injured party to believe that the injured

party was entitled to punitive damages or attorney fees. Trotter v. Summerour, 273 Ga. App. 263, 614 S.E.2d 887 (2005).

Res judicata. — Punitive damages served a public interest and were intended to protect the general public, and when the state sought punitive damages in a prior suit it did so as parens patriae, representing the interests of all Georgia citizens, including an administrator of a decedent's estate; the state and the administrator were privies in that prior case, and, pursuant to res judicata, a release executed as part of a settlement of that prior case barred punitive damages in a later case brought by the administrator alleging the same products liability theory. Brown & Williamson Tobacco Corp. v. Gault, 280 Ga. 420, 627 S.E.2d 549 (2006).

Whether the conversion was deemed to have occurred in Georgia (where the engines were built down) or, more plausibly, in Minnesota (where they were attached to the airframes), the jury, if the jury found the defendant's actions sufficiently willful and malicious, may award punitive damages; punitive damages were awarded because of tortious conduct, not because a plaintiff sustained a particular injury, and such an award was not precluded merely because a breach of contract was present. First Sec. Bank, N.A. v. Northwest Airlines, Inc., No. 95-12103-RGS, 2001 U.S. Dist. LEXIS 26601 (D. Mass. Jan. 3, 2001).

RESEARCH REFERENCES

ALR. — Availability and scope of punitive damages under state employment discrimination law, 81 ALR5th 367.

Validity of state statutory cap on punitive damages, 103 ALR5th 379.

Exemplary or punitive damages for pharmacist's wrongful conduct in preparing or dispensing medical prescription — Cases not under Consumer Product Safety Act (15 U.S.C.A. § 2072), 109 ALR5th 397.

51-12-6. Damages for injury to peace, happiness, or feelings.

Law reviews. — For article, "Sexual Harassment Claims Under Georgia Law," see 6 Ga. St. B.J. 16 (2000).

JUDICIAL DECISIONS

Analysis

General Consideration

Impact rule.

Georgia's current impact rule has three elements: (1) a physical impact to the plaintiff; (2) the physical impact causes physical injury to the plaintiff; and (3) the physical injury to the plaintiff causes the plaintiff 's mental suffering or emotional distress and the failure to satisfy all three elements has proven fatal to recovery; while the plaintiff did allege a physical impact from a bruised hand and a damaged fingernail as a result of the impact, the plaintiff did not claim that these physical injuries caused the plaintiff mental suffering or emotional distress; accordingly, the trial court erred in denying summary judgment to the defendants as to the plaintiff 's mental distress claim. Wilson v. Allen, 272 Ga. App. 172, 612 S.E.2d 39 (2005).

Malicious arrest. — O.C.G.A. § 51-12-6 described the appropriate measure of damages for a claim of malicious arrest. Little v. Chesser, 256 Ga. App. 228, 568 S.E.2d 54 (2002).

Cited in H.J. Russell & Co. v. Jones, 250 Ga. App. 28, 550 S.E.2d 450 (2001); Middlebrooks v. Hillcrest Foods, Inc., 256 F.3d 1241 (11th Cir. 2001); Barnett Bank of Southeast Ga. v. Hazel, 251 Ga. App. 836, 555 S.E.2d 195 (2001); Land v. Boone, 265 Ga. App. 551, 594 S.E.2d 741 (2004).

Evidentiary Principles

Evidence of worldly circumstances is not admissible. — Certified question was answered in the negative because the plain and explicit terms of the revised statute did not provide for evidence of a defendant's worldly circumstances to be admitted in a case in which the only injury was to a plaintiff's peace, happiness, or feelings. Holland v. Caviness, 292 Ga. 332, 737 S.E.2d 669 (2013).

Procedure

Because an employee chose to pursue punitive damages under O.C.G.A. § 51-12-5.1 rather than O.C.G.A. § 51-2-6, the employee was not entitled to punitive damages on a claim for negligent retention due to the fact that the jury specifically found that the employee had not suffered a physical injury. A finding of physical injury was required for punitive damages under O.C.G.A. § 51-12-5.1. Tomczyk v. Jocks & Jills Rests., LLC, 513 F. Supp. 2d 1351 (N.D. Ga. 2007).

Property Damage

Undue juror bias not shown. — In a trespassing case, damages awarded under O.C.G.A. § 51-12-6 did not show undue bias on the part of jurors because an owner did not seek the replacement value of trees that were improperly cut. Bullard v. Bouler, 272 Ga. App. 397, 612 S.E.2d 513 (2005).

Where only property damage is shown. — In a suit alleging a claim for injury to peace, happiness, and feelings after a creditor erroneously took the property of two non-debtors when the creditor executed a writ of possession of a debtor, because one of the non-debtors claimed that only furniture was damaged, the non-debtor failed to properly claim an injury to the non-debtor's peace, feelings, and happiness and, therefore, the creditor was entitled to summary judgment on that claim. Dierkes v. Crawford Orthodontic Care, P.C., 284 Ga. App. 96, 643 S.E.2d 364 (2007).

Applicability to Specific Cases

Trespass on burial plots.

Because there were damages flowing from the interference with a property right, the heirs' action alleging that a property owner interfered with a family's easement across the owner's land to and from a cemetery and trespassed and created a continuing nuisance within the cemetery, did not fall under O.C.G.A. § 51-12-6; therefore, the heirs could plead a claim for punitive damages. Davis v. Overall, 301 Ga. App. 4, 686 S.E.2d 839 (2009).

Provision of alcohol to a minor. — Trial court erred in granting summary judgment to a property owner and the party guests, as to a mother's claims that they provided alcohol to a minor, who later was killed in an auto accident, in violation of O.C.G.A. § 51-1-18(a), as there was a triable issue of fact where the evidence indicated that the owner allowed the guests to bring kegs of beer to the party, at which most of the other guests were minors, and that the guests knowingly allowed the deceased minor to drink beer from the kegs; the mother was not precluded from recovering damages under O.C.G.A. § 51-12-6, as there was a triable issue of fact as to whether these acts were intentional. Mowell v. Marks, 277 Ga. App. 524, 627 S.E.2d 141 (2006).

Abusive litigation prosecution.

In an abusive litigation action under O.C.G.A. § 51-7-80 et seq., a plaintiff could not recover for damages to the plaintiff's peace, happiness, or feelings under O.C.G.A. § 51-12-6, as there was no allegation of a physical injury, and the plaintiff did not allege a willful tort; there was no support in the record that the assertion of the peer review privilege under O.C.G.A. § 31-7-133(a) constituted a willful tort. Freeman v. Wheeler, 277 Ga. App. 753, 627 S.E.2d 86 (2006).

Apartment tenant could not recover for emotional distress absent impact or wilful or wanton conduct. — Apartment tenant was not entitled to recover damages for emotional distress from the landlord and management company based on their employees' conduct in giving the tenant's former boyfriend a key and the alarm code to the tenant's apartment because the tenant suffered no physical impact and there was no evidence that the defendants' conduct was malicious, wilful, or wanton. O.C.G.A. § 51-12-6 did not create a cause of action for emotional distress. Phillips v. Marquis at Mt. Zion-Morrow, LLC, 305 Ga. App. 74, 699 S.E.2d 58 (2010).

RESEARCH REFERENCES

ALR. — Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress — ethnic, racial, or religious harassment or discrimination, 19 ALR6th 1.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress — sexual harassment, sexual discrimination, or accusations concerning sexual conduct or orientation, 20 ALR6th 1.

51-12-7. Recovery of necessary expenses.

JUDICIAL DECISIONS

Attorney's fees.

Although the second corporation argued that the company and the owners' attorneys' fees, related to prior litigation and amounting to $3.8 million, were not recoverable as damages, the company and the owners' attorneys' fees, like its other damages, were directly traceable to the second corporation's misconduct, and lawyers' fees incurred in a related action, but caused by a defendant's wrongdoing, could be taken into consideration by the jury in estimating damages. The company and the owners did not have to show bad faith or stubborn litigiousness to recover such fees and O.C.G.A. § 51-12-7 provided that in all cases, necessary expenses consequent upon the injury done were a legitimate item in the estimate of damages. Douglas Asphalt Co. v. Qore, Inc., No. CV206-229, 2010 U.S. Dist. LEXIS 50141 (S.D. Ga. May 20, 2010).

Pleading of expenses.

Trial court erred in dismissing a real property purchaser's claims of negligent misrepresentation and promissory estoppel under O.C.G.A. § 13-3-44, as there was no requirement that the real property purchase agreement be enforceable for those claims to be actionable, and the agreement was enforceable at the time that it was made, such that reliance could have been had thereon; damages were properly pled, as recovery under promissory estoppel could have been had for damages that were equitable and necessary to prevent injustice, and as to negligent misrepresentation, necessary expenses consequent upon an injury were recoverable under O.C.G.A. § 51-12-7. Hendon Props. v. Cinema Dev., LLC, 275 Ga. App. 434, 620 S.E.2d 644 (2005).

Cited in Nash v. Studdard, 294 Ga. App. 845, 670 S.E.2d 508 (2008).

51-12-8. When damage too remote for recovery generally.

JUDICIAL DECISIONS

Analysis

Applicability to Specific Cases
3. Miscellaneous

Applicability to Specific Cases

3. Miscellaneous

Loan deficiencies following auto accident. — Trial court properly granted summary judgment to a driver on the owner's claim to recover the loan deficiency on the owner's wrecked vehicle as consequential damages because the owner had already been compensated for the fair market value of the wrecked vehicle and, pursuant to O.C.G.A. §§ 51-12-3(b), 51-12-8, and 51-12-9, the owner's outstanding vehicle loan amount was not the legal and natural consequence of the collision. McIntire v. Perkins, 317 Ga. App. 181, 729 S.E.2d 529 (2012), cert. denied, No. S12C1976, 2013 Ga. LEXIS 37 (Ga. 2013).

Negligent infliction of emotional distress claim failed. — Noting that Georgia courts and O.C.G.A. § 51-12-8 appeared to have not adopted a theory of liability premised on the mere "increased risk" of suffering from a future disease or injury, the U.S. District Court for the Northern District of Georgia did not perceive the presence of subclinical effects from the workers' exposure to beryllium at the manufacturer employer's plant as a cognizable "injury" under Georgia law; thus, those workers who were alleged to have endured only such effects failed to cross the threshold hurdle the Georgia courts had erected for recovery for negligently inflicted emotional distress. Parker v. Brush Wellman, Inc., 377 F. Supp. 2d 1290 (N.D. Ga. 2005).

RESEARCH REFERENCES

ALR. — Recovery for exposure to beryllium, 16 ALR6th 143.

51-12-9. How remoteness ascertained.

JUDICIAL DECISIONS

Analysis

Applicability to Specific Cases
3. Miscellaneous

Applicability to Specific Cases

3. Miscellaneous

Loan deficiencies following auto accident. — Trial court properly granted summary judgment to a driver on the owner's claim to recover the loan deficiency on the owner's wrecked vehicle as consequential damages because the owner had already been compensated for the fair market value of the wrecked vehicle and, pursuant to O.C.G.A. §§ 51-12-3(b), 51-12-8, and 51-12-9, the owner's outstanding vehicle loan amount was not the legal and natural consequence of the collision. McIntire v. Perkins, 317 Ga. App. 181, 729 S.E.2d 529 (2012), cert. denied, No. S12C1976, 2013 Ga. LEXIS 37 (Ga. 2013).

51-12-10. Exception to rule against recovery of remote damages.

JUDICIAL DECISIONS

Remote damages not allowed for bankruptcy trustee. — Bankruptcy trustee was not entitled to jury consideration of remote damages under O.C.G.A. § 51-12-10 since the trustee's claim was that the debtor's former attorney's violation of fiduciary duties owed to the debtor caused an excess judgment and the amount owed on the judgment because, even assuming that the attorneys know-

ingly violated fiduciary duties to the debtor, as alleged, there was no evidence that any violation was for the purpose of imposing an excess verdict on the debtor. Whiteside v. Decker, Hallman, Barber & Briggs, P.C., 310 Ga. App. 16, 712 S.E.2d 87 (2011).

51-12-11. Mitigation of damages required; exception.

Law reviews. — For annual survey of wills, trusts, guardianships, and fiduciary administration, see 58 Mercer L. Rev. 423 (2006).

JUDICIAL DECISIONS

Failure to mitigate damages by beneficiaries of trust. — When a bank was liable to the beneficiaries of a trust for not investing the trust's assets in treasury bills, the beneficiaries had a duty to mitigate their damages, and their delay in notifying the bank that the trust's settlor had died, and in probating the estate, causing the trust to be liable for past due estate taxes, reduced the damages the beneficiaries were entitled to because the bank's breach was not a positive tort exempt from mitigation. Wachovia Bank of Ga., N.A. v. Namik, 275 Ga. App. 229, 620 S.E.2d 470 (2005).

Jury instructions. — In a medical malpractice action, where part of the defense was that the injuries for which plaintiff sought recovery were attributable to plaintiff's negligence in failing to submit to recommended treatment, a charge on the contributory-negligence rule was appropriate and, as there was evidence that the injuries were also the product of defendant's negligence, a charge on comparative-negligence and its "equal to or greater than" bar was also warranted. Whelan v. Moone, 242 Ga. App. 795, 531 S.E.2d 727 (2000).

In a couple's personal injury case, there was no evidence to justify a charge on mitigation of damages under O.C.G.A. § 51-12-11. There was no evidence that the couple did activities that aggravated their conditions, stopped treatment despite medical advice, failed to obtain treatment, or otherwise failed to exercise ordinary care and diligence. Ga. Farm Bureau Mut. Ins. Co. v. Turpin, 294 Ga. App. 63, 668 S.E.2d 518 (2008).

Mitigation evidence relevant. — In a property owner's action for trespass and nuisance, the trial court did not err in denying the owner's motion in limine to exclude evidence suggesting that the owner should have built or re-built drains on the property because, at a minimum, the evidence the owner sought to exclude was relevant to the owner's claim of negligence in several ways, and any possible error admitting evidence of mitigation or decisions regarding the drains vis-a-vis the owner's claims of nuisance and trespass was self-induced. Bailey v. Annistown Rd. Baptist Church, Inc., 301 Ga. App. 677, 689 S.E.2d 62 (2009), cert. denied, No. S10C0669, 2010 Ga. LEXIS 468 (Ga. 2010).

51-12-12. Court interference with jury verdict as to damages.

Law reviews. — For article, "The Effect of the Mandated Discount Rate on the Value of Wrongful Death Awards in Georgia," see 52 Mercer L. Rev. 1147 (2001). For article, "Of Frivolous Litigation and Runaway Juries: A View from the Bench," see 41 Ga. L. Rev. 431 (2007).

JUDICIAL DECISIONS

Analysis

General Consideration
Second Trials and Appeals

APPLICABILITY TO SPECIFIC CASES

General Consideration

General damages are such as law presumes to flow from any tortious act, etc.

Where there is no direct proof of prejudice or bias on the part of a jury, an appellate court can set aside the verdict as excessive only when the amount, considered in connection with all the facts in evidence at trial, shakes the moral senses, i.e., the verdict must carry its death warrant on the verdict's face; however, such issues must be determined from the trial transcript, and where no transcript was either ordered or made for a trial in which a jury entered a judgment against a mortgage company, and the mortgage company made no attempt to have the trial court make a transcript or a reconstructed transcript of the proceedings approved by the trial judge, the appellate court assumed that the judgment was correct and supported by the evidence. Wells Fargo Home Mortg., Inc. v. Cook, 267 Ga. App. 368, 599 S.E.2d 319 (2004).

Verdict may be rendered for less than amount, etc.

Trial court properly affirmed the jury's damages award in a medical malpractice suit where the patient's own expert testified that only the failure to diagnose an ankle fracture earlier violated the standard of care, but the expert declined to specify a date when that violation occurred; the expert also testified that the treatment recommended for a sprain could also work for a break or a fracture, and that the patient would have incurred some of the medical expenses for treatment of the injured ankle regardless of any malpractice. Kohl v. Tirado, 256 Ga. App. 681, 569 S.E.2d 576 (2002).

Trial judge cannot reduce award.

Even though the defendant did not appeal the trial court's order denying its motion for new trial or cross-appeal the order granting the reduction in the punitive damage award, because the issue of the grant of a new trial on damages was material to the propriety of the court's order reducing the damage award, the order reducing the damage award was vacated and the case remanded for reconsideration. Dunn v. Five Star Dodge-Jeep-Eagle-Mazda, Inc., 245 Ga. App. 378, 537 S.E.2d 782 (2000).

Excessive damages are such as to shock the moral sense, etc.

Trial court properly denied a bank's motion for a new trial, pursuant to O.C.G.A. § 5-5-23, in a customer's slip and fall action wherein judgment was rendered in the customer's favor, where the bank argued that the amount awarded for the customer's pain and suffering was excessive under O.C.G.A. § 51-12-12(a), as the evidence did not support a finding that the damages awarded were so flagrantly excessive or inadequate, in light of the evidence, as to create a clear implication of bias, prejudice, or gross mistake by the jurors. Patterson Bank v. Gunter, 263 Ga. App. 424, 588 S.E.2d 270 (2003).

Discretion of trial court.

Trial court did not err in the court's calculation of damages because the trial court, acting as finder of fact, issued an award well within the range of evidence and testimony presented at trial; that the amount the trial court awarded exceeded the amount of commissions paid to a former employee was irrelevant. Sitton v. Print Direction, Inc., 312 Ga. App. 365, 718 S.E.2d 532 (2011).

Cited in Hammond v. Lee, 244 Ga. App. 865, 536 S.E.2d 231 (2000); Phillips v. Singleton, 245 Ga. App. 788, 539 S.E.2d 177 (2000); ARA Health Servs. v. Stitt, 250 Ga. App. 420, 551 S.E.2d 793 (2001); Wallace v. Stringer, 250 Ga. App. 850, 553 S.E.2d 166 (2001); Middlebrooks v. Hillcrest Foods, Inc., 256 F.3d 1241 (11th Cir. 2001); Marzullo v. Jim Ellis Motors, Inc., 253 Ga. App. 706, 560 S.E.2d 309 (2002); McCormick v. Harris, 253 Ga. App. 417, 559 S.E.2d 158 (2002); Beam v. Kingsley, 255 Ga. App. 715, 566 S.E.2d 437 (2002); Mason v. Ford Motor Co., 307 F.3d 1271 (11th Cir. 2002).

Second Trials and Appeals

Direct appeal of a court's interference with jury verdict. — The proper procedure for a direct appeal of a court's interference with a jury verdict under

subsection (b) is to appeal within 30 days from the final resolution of the matter. Three Crowns Antiques, Ltd. v. Jerrell, 244 Ga. App. 456, 535 S.E.2d 827 (2000).

Setting aside verdict as excessive. Court did not abuse its discretion in denying defendants' request to set aside an award of compensatory damages to a customer in an action alleging that, contrary to their agreement, defendants aired television commercials in Georgia that contained before-and-after pictures of the customer's hair replacement treatments because the award was not excessive under O.C.G.A. § 51-12-12(a). There was no evidence of flagrancy. Zieve v. Hairston, 266 Ga. App. 753, 598 S.E.2d 25 (2004).

Objections to form of verdict did not preclude new trial. — Rule requiring objections to the form of a verdict did not preclude a new trial to a father in a medical malpractice action for the wrongful death of a child on general grounds. Roberts v. Aderhold, 273 Ga. App. 642, 615 S.E.2d 761 (2005).

Applicability to Specific Cases

Damages for physical injuries not excessive or inadequate. Appellate court declined to set aside the amount of the verdict for pain and suffering and wrongful death where a juvenile in a child care institution was accidentally electrocuted because $1,000,000 for pain and suffering and $2,000,000 for wrongful death were not excessive as a matter of law. Ga. Dep't of Human Res. v. Johnson, 264 Ga. App. 730, 592 S.E.2d 124 (2003).

Jury award of $1,250,000 in favor of plaintiff injured in traffic accident case was not excessive; the injured person suffered, inter alia, hip fracture, six months of immobility, blood clots, pulmonary embolus, and permanent injuries from the accident, and the need for future surgery was shown. AT Sys. Southeast, Inc. v. Carnes, 272 Ga. App. 671, 613 S.E.2d 150 (2005).

Trial court properly ordered a new trial limited to the issue of the father's damages in a medical malpractice action for the wrongful death of a child because the jury verdict "in favor of the plaintiffs," necessarily reflected either a jury finding that the mother's contributory negligence barred a recovery by the father, which was contrary to the law, or that the father was not injured by the child's death, which was contrary to the evidence. Roberts v. Aderhold, 273 Ga. App. 642, 615 S.E.2d 761 (2005).

Trial court properly denied a mother's motion for a new trial after a verdict in favor of the parents in a medical malpractice action for the wrongful death of a child as the jury was authorized to find that even though a doctor was negligent, the mother's contributory negligence was equal to or greater than that of the doctor and thus defeated the right of recovery; the parents claimed that the child was stillborn due to the mother's gestational diabetes and the doctor claimed that the mother was negligent in failing to advise the doctor of a family history of diabetes and in failing to follow medical instructions. Roberts v. Aderhold, 273 Ga. App. 642, 615 S.E.2d 761 (2005).

In the car accident case, the appellate court refused to interfere, under O.C.G.A. § 51-12-12(a), with the jury's $7,000,000 verdict in favor of the injured party, as it did not shock the conscience; the injured party, who suffered life-threatening injuries and spent months recovering, could not return to work and suffered constant pain. Arnsdorff v. Fortner, 276 Ga. App. 1, 622 S.E.2d 395 (2005).

Because a negligent motorist admitted that the motorist caused a collision and the only issue tried before a jury was whether the collision was the proximate cause of the injured driver's damages, the entry of a verdict for the defense was not a manifest injustice, gross mistake, or bias that required that a new trial be had pursuant to O.C.G.A. § 51-12-12(a), as there was evidence that the injured driver had suffered other incidents that caused the driver similar back pain, as well as another prior collision, and that the driver had undergone chiropractic treatments for years; the lack of damages awarded was not so inadequate as to require that the appellate court overturn the trial court's judgment. Lindsey v. Turner, 279 Ga. App. 595, 631 S.E.2d 789 (2006).

Damages award was not excessive under O.C.G.A. § 51-12-12. The injured party proffered evidence that medical bills

were over $600,000, that the party would require more surgery, and that the party would need to replace parts of a prosthetic leg, at a cost of $30,000, about every three years; the party also showed that the party was no longer able to enjoy many physical activities in which the party had previously engaged and that the prosthesis became painful to wear by the end of each day. Hart v. Shergold, 295 Ga. App. 94, 670 S.E.2d 895 (2008), cert. denied, No. S09C0582, 2009 Ga. LEXIS 230 (Ga. 2009).

Medical malpractice. — When a jury in a medical malpractice case awarded parents of a deceased infant damages for the infant's pain and suffering and the medical expenses for the infant's hospital care, but awarded nothing on the parents' wrongful death claim, it was error to grant additur under O.C.G.A. § 51-12-12(b). Additur in such a case might be a substitution of the trial court's finding for the jury's. Columbus Reg'l Healthcare Sys. v. Henderson, 282 Ga. 598, 652 S.E.2d 522 (2007).

Award of zero damages in products liability case. — In a products liability action initiated by the plaintiff after its newly developed, ready-to-drink tea product line spoiled on the grocery shelves, the evidence supported a finding that the plaintiff's own negligence was greater than or equal to that of the defendant, and an award of zero damages was not so inadequate as to be inconsistent with the preponderance of the evidence. Shasta Beverages, Inc. v. Tetley USA, Inc., 248 Ga. App. 381, 546 S.E.2d 800 (2001).

Reduction of award by 90 percent. — The trial court did not manifestly abuse its discretion in denying a new trial on the ground that the verdict was excessive since the court exercised its authority under subsection (b) and reduced the damages to only ten percent of those awarded by the jury, which constituted a conditional grant of the defendants' motion. Porter v. Tissenbaum, 247 Ga. App. 816, 545 S.E.2d 372 (2001).

Compensatory damages of $750,000 not excessive. — After a truck driver punched the plaintiff in the face during a road rage incident, an award of $750,000 in compensatory damages against his employer was not so excessive as to entitle it to a new trial, as the employer, by defaulting, admitted the complaint's allegations that: (1) it knew the driver was incompetent to drive; (2) it acted recklessly in allowing the driver to drive; (2) the driver was acting within the scope of employment when the driver assaulted plaintiff; and (4) the plaintiff suffered severe emotional distress due to the attack. Aldworth Co. v. England, 276 Ga. App. 31, 622 S.E.2d 367 (2005), aff'd in part and rev'd in part, 281 Ga. 197, 637 S.E.2d 198, 2006 Ga. LEXIS 883 (2006).

Punitive damages of $1 million not excessive. — After a truck driver punched the plaintiff in the face during a road rage incident and the employer, by defaulting, admitted acting recklessly in allowing the driver to drive, a punitive damages award of $1 million, or 1.3 times compensatory damages, was not so excessive as to deny the employer due process; therefore, the employer was not entitled to new trial. Aldworth Co. v. England, 276 Ga. App. 31, 622 S.E.2d 367 (2005), aff'd in part and rev'd in part, 281 Ga. 197, 637 S.E.2d 198, 2006 Ga. LEXIS 883 (2006).

Punitive damage in trust action. — In a breach of trust action, trial court erred in denying defendant brothers' motion to reduce damages with respect to the punitive damage award because the jury specifically found that the brothers did not act with the specific intent to cause harm to the sister; the judgment could be affirmed only on the condition that the sister agreed to strike therefrom the award of punitive damages in excess of $250,000. Sims v. Heath, 258 Ga. App. 681, 577 S.E.2d 789 (2002) (Unpublished).

Verdict reflected gross mistake by jury. — Trial court erred in denying a college's motion for a new trial because, after a student's expert testified that if the student returned to school after trial, the lost income, additional tuition, and attorney fees would be $103,377; the jury's verdict of $698,500 so greatly exceeded the student's possible damages that it could only reflect a gross mistake by the jury. Morehouse College, Inc. v. McGaha, 277 Ga. App. 529, 627 S.E.2d 39 (2005).

Increase in damage award in contracting claim. — Trial court did not err

by refusing to enter a judgment molding with a jury's verdict to correct an alleged illegality and inconsistency in the damages award because under O.C.G.A. § 9-12-7, the trial court had no authority to mold the verdict since an increase in damages was a matter of substance, not mere form; a plumbing contractor was not without a potential remedy if the contractor believed that the jury's verdict was incorrect because after the return of the verdict but before the dispersal of the jury, the plumbing contractor could have argued that the jury's damage award was illegal and internally inconsistent and could have requested the trial court to give additional instructions and permit the jury to consider the matter again, and alternatively, after the jury was dispersed, the plumbing contractor could have asked for a new trial on the issue of damages or to conditionally grant a new trial under the court's power of additur under O.C.G.A. § 51-12-12. Gill Plumbing Co. v. Jimenez, 310 Ga. App. 863, 714 S.E.2d 342 (2011), cert. denied, No. S11C1826, 2011 Ga. LEXIS 966 (Ga. 2011).

Award excessive. — Trial court erred when the court denied a bank's motion for a new trial in a fraud case because the amount of damages awarded was excessive in that the evidence adduced at trial did not authorize the jury's award of $100,000 against the bank because the suing construction company alleged and proved only economic harm in an amount substantially less than that award, namely $9,400 via a materialman's lien, and renovation expenses in the amount of $23,000. Further, the jury's award of an additional $55,000 against the bank as punitive damages was erroneous since there was no charge on punitive damages, let alone proper guidance on the clear and convincing evidence required; the verdict form did not pose the question of punitive damages except by quotation of O.C.G.A. § 51-12-5.1(f), which required the jury to find specific intent to cause harm before the jury could award punitive damages in excess of $250,000; and the proceedings were not properly bifurcated. First Southern Bank v. C & F Servs., 290 Ga. App. 304, 659 S.E.2d 707 (2008).

Fraud claims. — In a breach of contract and fraud action, the appellate court refused to disturb the jury's verdict awarding the lessor general damages because such damages were available on a fraud claim and there simply was no basis to overturn the verdict. Goody Prods. v. Dev. Auth. of Manchester, No. A12A1725, 2013 Ga. App. LEXIS 229 (Mar. 20, 2013).

Award to co-incorporator upheld. — Damages' award to the damaged co-incorporator was upheld as the jury could have reasonably concluded that had the corporation pursued a development of certain advertising signs, then the co-incorporator would have been entitled to have that profit. Multimedia Techs., Inc. v. Wilding, 262 Ga. App. 576, 586 S.E.2d 74 (2003).

Award of $22,000 in trespass case not excessive. — In a trespass counterclaim, a jury's award of $22,000 properly withstood motions for relief from the judgment because there was evidence to support the verdict and even if the award, which had not been specifically enumerated as general or nominal damages, was awarded as nominal damages, such damages could vary widely in Georgia and were not subject to being set aside based solely on the amount. Wright v. Wilcox, 262 Ga. App. 659, 586 S.E.2d 364 (2003).

Award of $60,000 not inadequate. — Jury award of approximately $60,000 in a slip and fall case, which was only approximately $7,000 more than the injured person's medical bills, was not so inadequate as to have warranted a new trial where there was evidence of comparative negligence, including evidence that the injured person's diabetic condition, combined with the injured person's failure to eat, made the injured person dizzy, weak, and faint while at the restaurant, and evidence that the injured person was in a hurry, that the injured person's shoes did not give sufficient traction, that the injured person had just entered the same door that the injured person later exited, and that the injured person noticed the walkway was wet upon entering the restaurant; a jury was also allowed to reduce a verdict if the damages resulted from a preexisting condition, and there was evidence of the injured person's preexisting injuries, including evidence that the injured person had experienced pain and difficulties in the

injured person's hips, elbows, joints, and legs, had anxiety problems and depression, and had suffered from arthritis. Anderson v. L & R Smith, Inc., 265 Ga. App. 469, 594 S.E.2d 688 (2004).

Award of $100,000 for slander per se not excessive. — Pursuant to O.C.G.A. § 51-12-12, a trial court set aside as excessive a jury's award to a musician of $100,000 in general damages for slander per se committed by a radio personality. This was error since the evidence showed the radio broadcast falsely accusing the musician of murder damaged the musician's reputation and career, which was based on the musician's reputation as a positive role model for fathers. Riddle v. Golden Isles Broad., LLC, 292 Ga. App. 888, 666 S.E.2d 75 (2008).

Damages for breach of fiduciary duty. — General partner of a limited partnership that owned a shopping center, the partnership's president, and the shopping center managers' claim that the limited partners failed to support the damages awarded by a jury for breach of fiduciary duty in a derivative action was rejected as the claim was not raised below, the parties introduced expert testimony based upon an individual cash flow analysis that employed almost the same documentation, and the damages awarded by the jury for breach of fiduciary duty could be based on a cash flow analysis. T. C. Prop. Mgmt., Inc. v. Tsai, 267 Ga. App. 740, 600 S.E.2d 770 (2004).

It was not an abuse of discretion to deny a new trial motion brought by a trustee who was found to have breached the trustee's fiduciary duty to trust beneficiaries by making distributions to a co-trustee under a trust's encroachment provision, because the trustee breached the trustee's duty to protect the trust corpus as (1) the trustee inconsistently required the co-trustee to provide supporting evidence for corpus distributions and let the co-trustee exceed an allotted budget, and (2) the beneficiaries were damaged by the resulting reduction in trust corpus. Reliance Trust Co. v. Candler, 315 Ga. App. 495, 726 S.E.2d 636 (2012).

Damages awarded on one claim but not on another. — A jury's finding that damages should be awarded on one claim but not on another claim may be an inconsistent or contradictory verdict for which a trial court may use its traditional powers to grant a motion for new trial on liability and damages, but the verdict is not one reflecting "inadequate" damages for which the trial court may use its power to add to the verdict under O.C.G.A. § 51-12-12(b). Columbus Reg'l Healthcare Sys. v. Henderson, 282 Ga. 598, 652 S.E.2d 522 (2007).

Award not excessive in condemnation case. — Although the condemnee contended that the court erred in failing to apply O.C.G.A. § 51-12-12, § 51-12-12(b) provided that if the jury's award of damages was clearly so inadequate or so excessive as to any party as to be inconsistent with the preponderance of the evidence, the trial court may order a new trial as to damages only. But in the instant case, the jury's award was well within the range of the undisputed and competent evidence before the jury; that claim of error was therefore without merit. RNW Family P'ship, Ltd. v. DOT, 307 Ga. App. 108, 704 S.E.2d 211 (2010).

Damage award upheld. — A damages award was upheld on appeal from a breach of contract action, despite the suing party's claim that the amount was inadequate, because the record showed that the jury was charged, without objection, as to both an issue of damages and on causation, including mitigation, and awarded only those damages it determined flowed directly from the breach. Gold Kist, Inc. v. Base Mfg., 289 Ga. App. 690, 658 S.E.2d 228 (2008).

In a truck driver's suit against a mechanic to recover for faulty repairs, the evidence presented at trial authorized the jury's verdict awarding $200,000 in damages; therefore, the trial court did not abuse the court's discretion in denying the defendant's motion for new trial or for a remittitur under O.C.G.A. § 51-12-12(a). Because the plaintiff was unable to drive the plaintiff's own truck, the plaintiff spent thirty-two months unemployed, and an account summary provided by the employer was sufficient evidence from which the jury could determine lost wages. Smith v. Reddick, 319 Ga. App. 269, 735 S.E.2d 15 (2012).

51-12-13. Reduction of expenses, wages, and other damages to present value.

(a) In determining the present value of future medical expenses, living expenses, lost wages, or other economic damages, the trier of fact may reduce the same to the present value based on a discount rate of 5 percent or any other discount rate as the trier of fact may deem appropriate.

(b) This Code section shall not be construed to provide for the introduction of evidence showing the cost of any specific private investment product, including, but not limited to, an annuity. (Ga. L. 1970, p. 168, § 2; Ga. L. 2013, p. 759, § 1/HB 94.)

The 2013 amendment, effective July 1, 2013, rewrote this Code section.

51-12-14. Procedure for demand of unliquidated damages in tort actions; when interest may be recovered.

(a) Where a claimant has given written notice by registered or certified mail or statutory overnight delivery to a person against whom claim is made of a demand for an amount of unliquidated damages in a tort action and the person against whom such claim is made fails to pay such amount within 30 days from the mailing or delivering of the notice, the claimant shall be entitled to receive interest on the amount demanded if, upon trial of the case in which the claim is made, the judgment is for an amount not less than the amount demanded. However, if, at any time after the 30 days and before the claimant has withdrawn his or her demand, the person against whom such claim is made gives written notice by registered or certified mail or statutory overnight delivery of an offer to pay the amount of the claimant's demand plus interest under this Code section through the date such notice is given, and such offer is not accepted by the person making the demand for unliquidated damages within 30 days from the mailing or delivering of such notice by the person against whom such claim is made, the claimant shall not be entitled to receive interest on the amount of the demand after the thirtieth day following the date on which the notice of the offer is mailed or delivered even if, upon trial of the case in which the claim is made, the judgment is for an amount not less than the sum demanded pursuant to this Code section.

(b) Any written notice referred to in subsection (a) of this Code section shall specify that it is being given pursuant to this Code section.

(c) The interest provided for by this Code section shall be at an annual rate equal to the prime rate as published by the Board of Governors of the Federal Reserve System, as published in statistical

release H. 15 or any publication that may supersede it, on the thirtieth day following the date of the mailing of the last written notice plus 3 percent, and shall begin to run from the thirtieth day following the date of the mailing or delivering of the written notice until the date of judgment. This subsection shall apply to all civil actions filed on or after July 1, 2003.

(d) Evidence or discussion of interest on liquidated damages, as well as evidence of the offer, shall not be submitted to the jury. Interest shall be made a part of the judgment upon presentation of evidence to the satisfaction of the court that this Code section has been complied with and that the verdict of the jury or the award by the judge trying the case without a jury is equal to or exceeds the amount claimed in the notice.

(e) This Code section shall be known and may be cited as the "Unliquidated Damages Interest Act." (Ga. L. 1968, p. 1156, § 1; Ga. L. 1975, p. 395, § 1; Ga. L. 1981, p. 681, § 1; Ga. L. 1991, p. 1394, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2003, p. 820, § 6.)

The 2003 amendment, effective July 1, 2003, in subsection (a), inserted "or delivering" twice and, in the second sentence, inserted "or her" and inserted "or delivered"; in subsection (b), deleted "may be given on only one occasion and" preceding "shall specify"; and, in subsection (c), substituted the present first sentence for the former first sentence which read: "The interest provided for by this Code section shall be at the rate of 12 percent per annum and shall begin to run from the thirtieth day following the date of the mailing of the written notice until the date of judgment.", and added the last sentence.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2003, "July 1, 2003" was substituted for "the effective date of this subsection" at the end of subsection (c).

Editor's notes. — Ga. L. 2003, p. 820, § 9, not codified by the General Assembly, provides that this Act "shall apply to all civil actions filed on or after July 1, 2003."

Law reviews. — For annual survey of law of torts, see 56 Mercer L. Rev. 433 (2004). For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005).

For note on the 2003 amendment to this Code section, see 20 Ga. St. U.L. Rev. 28 (2003).

JUDICIAL DECISIONS

Construction with O.C.G.A. § 7-4-12. — Trial court did not err in adding interest to the award before considering whether the judgment was greater than the demand for purposes of O.C.G.A. § 51-12-14, as § 51-12-14 had to be construed in pari materia with O.C.G.A. § 7-4-12; post-judgment interest continued to accrue under O.C.G.A. § 7-4-12 until the set-off became effective under O.C.G.A. § 9-13-75. Sec. Life Ins. Co. v. St. Paul Marine & Fire Ins. Co., 263 Ga. App. 525, 588 S.E.2d 319 (2003).

Where statutory notice required under this section is not given, award of interest cannot stand.

Notice given by an employee who sued an employer and supervisors for malicious prosecution in an effort to be entitled to prejudgment interest did not comply with a strict construction of the applicable statute. Wolf Camera, Inc. v. Royter, 253 Ga.

App. 254, 558 S.E.2d 797 (2002).

Notice to a party's lawyer constitutes notice to the party under O.C.G.A. § 51-12-14. Bennett v. Mullally, 263 Ga. App. 215, 587 S.E.2d 385 (2003).

Entitlement to prejudgment interest.

Plaintiff welder and his wife were entitled to an award of prejudgment interest, in a negligence/loss of consortium action, under Georgia's Unliquidated Damages Interest Act, O.C.G.A. § 51-12-14, where their demand letter was addressed only to defendant landowner's insurer but was also sent to the landowner, via certified mail. However, the judgment for the welder and his wife was reversed due to trial court error on a jury instruction. Long Leaf Indus., Inc. v. Mitchell, 252 Ga. App. 343, 556 S.E.2d 242 (2001).

The couple was entitled to prejudgment interest in a medical malpractice action as they made a single settlement demand to either defendant, despite sending two letters, and the payment of the settlement by either party would have ended the litigation. Kniphfer v. Mem'l Health Univ. Med. Ctr., Inc., 256 Ga. App. 874, 570 S.E.2d 16 (2002).

Trial court erred in awarding prejudgment interest to first injured party on first injured party's motion for that interest as the statute, which had to be strictly construed because it was in derogation of the common law, required that the judgment awarded be greater than the amount the party requested in settlement and that was not the situation for the first injured party. White v. Jensen, 257 Ga. App. 560, 571 S.E.2d 544 (2002).

Driver was properly required to pay interest during the two years between the first defense verdict and the trial court's ruling on the injured party's motion for a new trial because the delay was within the driver's control; acceptance of the offer to settle for $100,000 was always within the driver's control, and there was no error in the award of prejudgment interest. Bennett v. Mullally, 263 Ga. App. 215, 587 S.E.2d 385 (2003).

Trial court did not err in awarding pre-judgment interest under O.C.G.A. § 51-12-14 because there remained a balance on an attorney fees award under O.C.G.A. § 9-15-14, that survived the appeal and that was not paid by the insurer, and was no longer subsumed in a later judgment. To the extent that Restina v. Crawford, 205 Ga. App. 887 (1992) required that set-offs of prior settlements with other joint tortfeasors had to be considered in determining if the demand had been equaled or exceeded for the imposition of pre-judgment interest, such language is disapproved. Sec. Life Ins. Co. v. St. Paul Marine & Fire Ins. Co., 263 Ga. App. 525, 588 S.E.2d 319 (2003).

Appellate court's determination of the amount on which an award of prejudgment interest was to be based was error because that amount included a pretrial award of attorney fees for discovery misconduct, and pre- and post-judgment interest on that award, but the award had been vacated, and it was the law of the case that the amount of that award had to be retried, so the trial court could not, on remand, find that its attorney fees award was simply no longer subsumed in the jury's verdict. Sec. Life Ins. Co. of Am. v. St. Paul Fire & Marine Ins. Co., 278 Ga. 800, 606 S.E.2d 855 (2004).

Because a stockholder failed to comply with O.C.G.A. § 51-12-14, and prejudgment interest was not authorized by O.C.G.A. § 7-4-15, these awards entered in favor of the stockholder were reversed. Monterrey Mexican Rest. of Wise, Inc. v. Leon, 282 Ga. App. 439, 638 S.E.2d 879 (2006).

No authority to amend judgment to award pre-judgment interest after appeal filed. — In a negligence suit wherein a train patron was attacked and raped while exiting a train station, the trial court erred by amending its judgment and granting the train patron pre-judgment interest as the defending public transportation authority had already filed a notice of appeal, therefore, the trial court was without jurisdiction to amend its judgment to include the pre-judgment interest. MARTA v. Doe, 292 Ga. App. 532, 664 S.E.2d 893 (2008).

Right to post-judgment interest. — Under O.C.G.A. § 7-4-12, interest on a judgment continues to accrue at the rate of 12 percent per annum until paid; such post-judgment interest is a damage that

the plaintiffs recover against the defendants, and is included in calculating the recovery against it for purposes of O.C.G.A. § 51-12-14, because post-judgment interest at 12 percent is intended to deter post-judgment delay, motions, and appeals and to bring finality to judgments or the defendant pays the price of protracted post-judgment litigation. Sec. Life Ins. Co. v. St. Paul Marine & Fire Ins. Co., 263 Ga. App. 525, 588 S.E.2d 319 (2003).

ARTICLE 2

JOINT TORT-FEASORS

Law reviews. — For survey article on business associations law, see 59 Mercer L. Rev. 35 (2007). For article, "Who Owes How Much? Developments in Apportionment and Joint and Several Liability Under O.C.G.A. § 51-12-33," see 64 Mercer L. Rev. 15 (2012).

51-12-30. Procurer of wrong as joint wrongdoer; how action brought against joint wrongdoer.

Law reviews. — For survey article on labor and employment law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 303 (2003).

JUDICIAL DECISIONS

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General Consideration

LLC formed by individuals alleged to have breached employment covenants. — An interlocutory injunction was properly entered against a limited liability company (LLC) formed by two individuals who left a beauty salon with which they had signed covenants not to compete and not to solicit customers and employees; the LLC was a proper party to the suit given the evidence that it had maliciously helped to bring about the two individuals' alleged breach of the covenants. Bijou Salon & Spa, LLC v. Kensington Enters., 283 Ga. App. 857, 643 S.E.2d 531 (2007).

Procurer of actionable wrong liable. — One who procures or assists in the commission of an actionable wrong is equally liable with the actual perpetrator for the damages. The word procure, as used in O.C.G.A. § 51-12-30, does not require the lending of assistance in the actual perpetration of the wrong done by another; but if one, acting only through advice, counsel, persuasion, or command, succeeds in procuring any person to commit an actionable wrong, the procurer becomes liable for the injury, either singly or jointly, with the actual perpetrator. White v. Shamrock Bldg. Sys., 294 Ga. App. 340, 669 S.E.2d 168 (2008).

Interference with economic relationships. — The statute does not establish a cause of action for interference with economic relationships. Project Control Servs., Inc. v. Reynolds, 247 Ga. App. 889, 545 S.E.2d 593 (2001).

Cited in Hays v. Paul, Hastings, Janofsky & Walker LLP, No. 1:06-CV-754-CAP, 2006 U.S. Dist. LEXIS 95849 (N.D. Ga. Sept. 14, 2006).

Corporate Environment

Corporate liability for violations by employed notaries public. — In response to certified questions from a federal action, and under the plain and un-

ambiguous language of Georgia's notary statute, a corporation employing notaries public was not subject directly to O.C.G.A. § 45-17-11, and the corporation was not subject to vicarious liability for a violation thereof, although the corporation could still be held liable if the corporation procured or otherwise qualified as a party to or participant in such a violation by a notary pursuant to O.C.G.A. § 51-12-30; the question arose with respect to a mortgagee's charges that included substantial notary fees with respect to a refinancing transaction. Anthony v. Am. Gen. Fin. Servs., 287 Ga. 448, 697 S.E.2d 166 (2010).

Conspiracy

Evidence sufficient to establish civil conspiracy. — Evidence that an appellant, with the support of the parties' lessor, began operating a business out of the lessor's store that competed with a business jointly owned by the appellant and the appellee, which also operated out of the store, was sufficient to establish that the appellant and lessor committed a civil conspiracy against the appellee in violation of O.C.G.A. § 51-12-30. Asgharneya v. Hadavi, 298 Ga. App. 693, 680 S.E.2d 866 (2009), overruled on other grounds, Jordan v. Moses, 291 Ga. 39, 727 S.E.2d 460 (2012).

Pleadings and Practice

Joint tortfeasors on notice. — Because a corporation's complaint put defendants on sufficient notice that defendants were joint tortfeasors who acted in concert with the corporation's president in a breach of fiduciary duty, the corporation stated a viable claim under O.C.G.A. § 51-12-30; thus, summary judgment against the corporation was reversed. Insight Tech., Inc. v. FreightCheck, LLC, 280 Ga. App. 19, 633 S.E.2d 373 (2006).

Absent allegations that the defendant hospital officials acted maliciously or with such recklessness as denoted a corrupt or malevolent disposition, or that the officials hired a substance abuse counselor with the intent to injure plaintiff patients, the officials were not joint tortfeasors under O.C.G.A. § 51-12-30 along with the counselor with regard to the counselor's alleged sexual harassment of the patients. Doe v. Fulton-DeKalb Hosp. Auth., 628 F.3d 1325 (11th Cir. 2010).

51-12-31. Recovery against joint trespassers.

Except as provided in Code Section 51-12-33, where an action is brought jointly against several persons, the plaintiff may recover damages for an injury caused by any of the defendants against only the defendant or defendants liable for the injury. In its verdict, the jury may specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally. (Orig. Code 1863, § 3007; Code 1868, § 3020; Code 1873, § 3075; Code 1882, § 3075; Civil Code 1895, § 3915; Civil Code 1910, § 4512; Code 1933, § 105-2011; Ga. L. 1987, p. 915, § 8; Ga. L. 1992, p. 6, § 51; Ga. L. 2005, p. 1, § 12/SB 3.)

The 2005 amendment, effective February 16, 2005, in the first sentence, substituted "persons" for "trespassers", substituted "an injury caused" for "the greatest injury done", and substituted "only the defendant or defendants liable for the injury" for "all of them" at the end.

Editor's notes. — Ga. L. 2005, p. 1, § 1, not codified by the General Assembly, provides that: "The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the avail-

ability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act."

Ga. L. 2005, p. 1, § 14, not codified by the General Assembly, provides for severability.

Ga. L. 2005, p. 1, § 15(b), not codified by the General Assembly, provides that the amendment of this Code section by that Act shall apply only with respect to causes of action arising on or after February 16, 2005, and any prior causes of action shall continue to be governed by prior law.

Law reviews. — For article on 2005 amendment of this Code section, see 22 Ga. St. U.L. Rev. 221 (2005). For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005).

For note, "The Effect (Or Noneffect) of the 2004 Amendments to O.C.G.A. §§ 51-12-31 and 51-12-33 on Joint Liability in Georgia," see 44 Ga. L. Rev. 215 (2009).

For comment, "Where Do We Go From Here? The Future of Caps on Noneconomic Medical Malpractice Damages in Georgia," see 28 Ga. St. U.L. Rev. 1341 (2012).

JUDICIAL DECISIONS

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General Consideration

Contribution. — Insurer was entitled to add certain parties as defendants in its declaratory judgment suit against insureds and a landowner, who had filed an underlying property damage suit against the insureds, because those parties had been added by the landowner as defendants in the underlying suit; if those parties were not included in the insurer's declaratory judgment suit, they might be precluded from obtaining contribution from an uninsured joint tortfeasor in accordance with O.C.G.A. § 51-12-31. Owners Ins. Co. v. Bryant, No. 3:05-cv-48 (CAR), 2006 U.S. Dist. LEXIS 1685 (M.D. Ga. Jan. 9, 2006).

Cited in Furlong v. Dyal, 246 Ga. App. 122, 539 S.E.2d 836 (2000).

51-12-32. Right of contribution among joint trespassers; effect of settlement.

Law reviews. — For annual survey of local government law, see 57 Mercer L. Rev. 289 (2005). For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005).

For note, "The Effect (Or Noneffect) of the 2004 Amendments to O.C.G.A. §§ 51-12-31 and 51-12-33 on Joint Liability in Georgia," see 44 Ga. L. Rev. 215 (2009).

JUDICIAL DECISIONS

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General Consideration

Right of indemnity would not be lost or prejudiced by compromise and settlement. Auto-Owners Ins. Co. v. Anderson, 252 Ga. App. 361, 556 S.E.2d 456 (2001).

Settlement without admission of liability. — When there has been a settlement by multiple defendants containing no admission of liability, a defendant seeking contribution from another party to the settlement must prove joint negligence. Suggs v. Hale, 278 Ga. App. 358, 629 S.E.2d 11 (2006).

Participation in declaratory judgment suit. — Insurer was entitled to add certain parties as defendants in its declaratory judgment suit against insureds and a landowner, who had filed an underlying property damage suit against the insureds, because those parties had been added by the landowner as defendants in the underlying suit; if those parties were not included in the insurer's declaratory judgment suit, they might be precluded from obtaining contribution from an uninsured joint tort-feasor in accordance with O.C.G.A. § 51-12-31. Owners Ins. Co. v. Bryant, No. 3:05-cv-48 (CAR), 2006 U.S. Dist. LEXIS 1685 (M.D. Ga. Jan. 9, 2006).

Under this section, right to contribution, etc.

The trial court properly dismissed a business' contribution action, filed pursuant to O.C.G.A. § 51-12-32, on subject matter jurisdiction grounds, as: (1) its finding that the business was the sole tort-feasor barred the action; (2) that finding was not void; (3) no appeal was taken from that finding; and (4) the suit amounted to an improper collateral attack on the default judgment entered against the business. State Auto Mut. Ins. Co. v. Relocation & Corporate Hous. Servs., 287 Ga. App. 575, 651 S.E.2d 829 (2007), cert. denied, 2008 Ga. LEXIS 163 (Ga. 2008).

Contribution among joint tort-feasors is enforceable where one has paid more than his pro rata share of judgment.

In a contribution action the contribution plaintiff was entitled to contribution from the defendant, because the contribution plaintiff paid more than its pro rata share of a judgment while the defendant, a joint tort-feasor, paid less than the defendant's pro rata share; that the contribution plaintiff elected to go to trial rather than settle the underlying claim did not affect the contribution plaintiff 's right to contribution. Pilzer v. Va. Ins. Reciprocal, 272 Ga. App. 27, 611 S.E.2d 706 (2005).

Summary judgment for a company was affirmed as the company was entitled under O.C.G.A. § 51-12-32 to contribution from a professional corporation (PC) since the company and the PC were jointly and severally liable for a judgment entered for a patient and the pro rata share of each was 50 percent; the common burden that the parties were equally bound to bear was the amount of the post-verdict judgment. Campbell, Odom & Griffith, P.C. v. Doctors Co., 281 Ga. App. 684, 637 S.E.2d 108 (2006).

To enforce contribution claim, etc.

Under O.C.G.A. § 51-12-32(b), a defendant is entitled to contribution from a co-defendant when a judgment has been entered against both but paid by one in an amount exceeding that one's pro rata share. In a contribution claim brought by an insurer against a doctor based on a judgment entered against the doctor and the insurer's insured jointly, tort liability was established, so the doctor's liability depended not on proof of negligence, but on the existence of the judgment against the doctor and the payment by the insurer of more than its share. Va. Ins. Reciprocal v. Pilzer, 278 Ga. 190, 599 S.E.2d 182 (2004).

Judgment debtors were equally liable for attorney fees. Gerschick v. Pounds, 262 Ga. App. 554, 586 S.E.2d 22 (2003), overruled on other grounds by VATACS Group, Inc. v. HomeSide Lending, Inc., 281 Ga. 50, 635 S.E.2d 758 (2006).

Official immunity meant no contribution or indemnity. — Although a tort-feasor was generally entitled to contribution or indemnity from a joint tort-feasor, the state port authority could not be held liable to the ship owner for

contribution and indemnity because the state port authority was entitled to Eleventh Amendment immunity on the injured worker's maritime tort claim; since the state port authority could not be held liable on the underlying claim, the authority also could not be held liable for contribution or indemnity. Ga. Ports Auth. v. Andre Rickmers Schiffsbeteiligungsges mbH & Co. K.G., 262 Ga. App. 591, 585 S.E.2d 883 (2003).

Contribution claim against city barred by res judicata. — City, an engineering firm's alleged joint tort-feasor, had already been found not liable for a nuisance to condominium residents in their suit against the city and firm concerning a flooded sewer system designed by the firm. Therefore, the firm's subsequent suit against the city for contribution based on a nuisance theory was barred by res judicata. Greenhorne & O'Mara, Inc. v. City of Atlanta, 298 Ga. App. 261, 679 S.E.2d 818 (2009).

Party's failure to assert an available defense precluded contribution and indemnity claims. — Because a medical care provider failed to assert an available defense in the underlying action which would have absolved it from any liability and prevented a default judgment from being entered against it, the trial court did not err in entering summary judgment against it on its claims for contribution and indemnity. Emergency Professionals of Atlanta, P.C. v. Watson, 288 Ga. App. 473, 654 S.E.2d 434 (2007), cert. denied, 2008 Ga. LEXIS 407 (Ga. 2008).

Cited in Federal Paper Bd. Co. v. Harbert-Yeargin, Inc., 92 F. Supp. 2d 1342 (N.D. Ga. 1998); Thyssen Elevator Co. v. Drayton-Bryan Co., 106 F. Supp. 2d 1355 (N.D. Ga. 2000); Auto-Owners Ins. Co. v. Anderson, 252 Ga. App. 361, 556 S.E.2d 456 (2001); JNJ Found. Specialists, Inc. v. D. R. Horton Inc., 311 Ga. App. 269, 717 S.E.2d 219 (2011).

Application to Corporations

Application to janitorial company. — Pedestrian sued a property maintenance company for injuries allegedly suffered in a slip and fall on an icy sidewalk; the company filed an action for contribution and indemnity against a janitorial service. As the service had a contractual duty to a government agency to clear the sidewalk of ice, and the janitorial service's failure to perform this duty increased the risk that the pedestrian would be injured, the janitorial service was not entitled to summary judgment on the company's claims. Urban Servs. Group, Inc. v. Royal Group, Inc., 295 Ga. App. 350, 671 S.E.2d 838 (2008).

Application to Employment Situations

No indemnification available when party seeking indemnification failed to assert an available defense. — Lawn maintenance contractor was not entitled to recover contractual or common law indemnification against a subcontractor after the contractor paid a settlement to a person injured when the person stepped in a hole in a curb because the contractor went into default and failed to assert the defense that the contractor had no duty to maintain the curb. U.S. Lawns, Inc. v. Cutting Edge Landscaping, LLC, 311 Ga. App. 674, 716 S.E.2d 779 (2011).

Pleading and Practice

University was not precluded from seeking indemnification under O.C.G.A. § 51-12-32 for failure to assert valid defense to IRS determination that bonds were not tax exempt; at the motion to dismiss stage, neither complaint nor related documents contained facts establishing that bidding process met requirements of 26 C.F.R. § 1.148-5(d)(6)(iii). Corp. of Mercer Univ. v. JPMorgan Chase & Co., No. 5:07-CV-243(HL), 2008 U.S. Dist. LEXIS 23919 (M.D. Ga. Mar. 26, 2008).

Indemnity claim against broker for loss of tax-exempt status. — There was nothing in Georgia law that prevented the obligor of a bond issue from asserting an indemnity claim against a broker whose wrongful conduct caused the bonds to lose their tax-exempt status. Corp. of Mercer Univ. v. JPMorgan Chase & Co., No. 5:07-CV-243(HL), 2008 U.S. Dist. LEXIS 23919 (M.D. Ga. Mar. 26, 2008).

Statute of limitations. — Subcontractor's claim against a consultant for contribution was given by statute, O.C.G.A.

§ 51-12-32(a), and the subcontractor's claim for indemnity arose by operation of law. Therefore, the subcontractor's suit for contribution and indemnity against the consultant was a claim to enforce rights that accrued by operation of law or a statute and was subject to a 20-year statute of limitations under O.C.G.A. § 9-3-22. Saiia Constr., LLC v. Terracon Consultants, Inc., 310 Ga. App. 713, 714 S.E.2d 3 (2011).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 7A Am. Jur. Pleading and Practice Forms, Contribution, § 2.

51-12-33. Reduction and apportionment of award or bar of recovery according to percentage of fault of parties and nonparties.

(a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.

(b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

(c) In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.

(d)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.

(2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

(e) Nothing in this Code section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section.

(f)(1) Assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties.

(2) Where fault is assessed against nonparties pursuant to this Code section, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.

(g) Notwithstanding the provisions of this Code section or any other provisions of law which might be construed to the contrary, the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed. (Code 1981, § 51-12-33, enacted by Ga. L. 1987, p. 915, § 8; Ga. L. 2005, p. 1, § 12/SB 3.)

The 2005 amendment, effective February 16, 2005, rewrote this Code section.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2005, "and" was substituted for "or" near the beginning of subsection (g).

Editor's notes. — Ga. L. 2005, p. 1, § 1, not codified by the General Assembly, provides that: "The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act."

Ga. L. 2005, p. 1, § 14, not codified by the General Assembly, provides for severability.

Ga. L. 2005, p. 1, § 15(b), not codified by the General Assembly, provides that the amendment of this Code section by that Act shall apply only with respect to causes of action arising on or after February 16, 2005, and any prior causes of action shall continue to be governed by prior law.

Law reviews. — For article on 2005 amendment of this Code section, see 22 Ga. St. U.L. Rev. 221 (2005). For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005). For survey article on evidence law, see 60 Mercer L. Rev. 135 (2008). For annual survey on trial practice and procedure, see 64 Mercer L. Rev. 305 (2012). For article, "Who Owes How Much? Developments in Apportionment and Joint and Several Liability Under O.C.G.A. § 51-12-33," see 64 Mercer L. Rev. 15 (2012).

For note, "The Effect (Or Noneffect) of the 2004 Amendments to O.C.G.A. §§ 51-12-31 and 51-12-33 on Joint Liability in Georgia," see 44 Ga. L. Rev. 215 (2009).

For comment, "Where Do We Go From Here? The Future of Caps on Noneconomic Medical Malpractice Damages in

Georgia," see 28 Ga. St. U.L. Rev. 1341 (2012).

JUDICIAL DECISIONS

Applicability.

Trial court erred by granting the parents of a businessman, shot and killed while a guest at a motel, partial summary judgment in the parents' wrongful death action and by holding that the apportionment of fault statute, O.C.G.A. § 51-12-33, did not apply because the statute applied since the actions of a criminal assailant were separate from the property owner and no respondent superior existed. Accor N. Am., Inc. v. Todd, 318 Ga. App. 317, 733 S.E.2d 846 (2012).

Interspousal tort immunity doctrine. — Application of the apportionment of damages pursuant to O.C.G.A. § 51-12-33 did not violate the interspousal tort immunity doctrine, O.C.G.A. § 19-3-8, because the trial court's holding that the jury should have been instructed to apportion the award of damages to a wife according to the jury's determination of the percentage of fault of her husband and a driver, if any, in no way requires the wife to file suit against her husband, but instead, precluded the wife from recovering from the driver that portion of her damages, if any, that a trier of fact concluded resulted from the negligence of her husband. Barnett v. Farmer, 308 Ga. App. 358, 707 S.E.2d 570 (2011).

Multiple parties required for instruction on section. — Trial court did not err in not instructing the jury on apportioning damages between defending parties as the patient's action in dismissing with prejudice a company doctor from the patient's medical malpractice suit meant such an instruction would have been inappropriate as the action was no longer against the multiple parties that statutory law required before such an instruction could be given. Schriever v. Maddox, 259 Ga. App. 558, 578 S.E.2d 210 (2003).

Trial court erred in ruling that damages could be apportioned against a third party as O.C.G.A. § 51-12-33(a) did not authorize a jury to apportion damages against a non-party. Fraker v. C.W. Matthews Contr. Co., 272 Ga. App. 807, 614 S.E.2d 94 (2005), aff'd, 2007 U.S. App. LEXIS 28793 (11th Cir. 2007).

Reduction of damages award. — The 2005 amendment to O.C.G.A. § 51-12-33(a), providing that a judge shall reduce the amount of damages otherwise awarded to a plaintiff in proportion to his or her percentage of fault, shows legislative approval of a procedure under which the trial court reduces the jury's damage award in proportion to the degree of fault the jury attributes to the plaintiff. Turner v. New Horizons Cmty. Serv. Bd., 287 Ga. App. 329, 651 S.E.2d 473 (2007).

Delivery service's claim that an employee of a security company who was injured while inspecting one of the delivery service's trucks, and who filed a negligence action against the delivery service was also partially negligent for the injuries that the employee suffered, lacked merit in the context of the service's action, seeking indemnification from the security company, as there were no allegations of negligence against anyone other than the delivery service and the driver such that claims of comparative and contributory negligence under O.C.G.A. § 51-12-33 were unavailing. UPS v. Colt Sec. Agency, Inc., 296 Ga. App. 815, 676 S.E.2d 22 (2009).

Apportionment not permitted when entity is not party to action. — Trial court did not err in denying a motion for judgment notwithstanding the verdict after a jury awarded damages on an insurer's subrogation claim as there could be no apportionment of damages with a city, even if the city was deemed liable, because the city was not a party to the action pursuant to O.C.G.A. § 51-12-33. Universal Underwriters Group v. Southern Guar. Ins. Co., 297 Ga. App. 587, 677 S.E.2d 760 (2009).

Apportionment permitted when third party's fault at issue. — Third party's plea was admissible under former O.C.G.A. § 24-3-35(2) (see now O.C.G.A. § 24-8-804) as a third-party admission

because the third party's fault had properly been made an issue under O.C.G.A. § 51-12-33. Woods v. Allied Van Lines, Inc., 316 Ga. App. 548, 730 S.E.2d 35 (2012).

Apportionment requirement applies even if plaintiff is not at fault. — In applying O.C.G.A. § 51-12-33, the trier of fact must apportion the court's award of damages among the persons who are liable according to the percentage of fault of each person even if the plaintiff is not at fault for the injury or damages claimed. McReynolds v. Krebs, 290 Ga. 850, 725 S.E.2d 584 (2012).

Apportionment must be raised as issue before first day of trial. — In a wrongful death action, the trial court did not err in excluding the issue of apportionment from the jury's consideration because the defendant failed to comply with the notice requirements of the apportionment statute, O.C.G.A. § 51-12-33(d)(1), and did not raise the issue of apportionment until the first day of trial. Freese II, Inc. v. Mitchell, 318 Ga. App. 662, 734 S.E.2d 491 (2012).

Exception to apportionment requirement. — O.C.G.A. § 51-12-33 required the apportionment of damages among multiple tortfeasors even if the plaintiff was not at fault. However, given that a vehicle manufacturer settled with the plaintiff before trial and that the other driver in the collision presented no evidence for apportionment, a trial court did not err by dismissing the driver's crossclaim for setoff and contribution. McReynolds v. Krebs, 307 Ga. App. 330, 705 S.E.2d 214 (2010), aff'd, 290 Ga. 850, 725 S.E.2d 584 (2012).

O.C.G.A. § 51-12-33 did not apply to a city's water customers claims that the city overcharged the customers for water and sewage service because the claims were not for injury to person or property. City of Atlanta v. Benator, 310 Ga. App. 597, 714 S.E.2d 109 (2011).

Injured person's father's employer bore no fault in an asbestos-related action for damages that could have been assessed to it as a nonparty under O.C.G.A. § 51-12-33 because it did not owe a duty of care to a third-party, non-employee who came into contact with its employee's asbestos-tainted work clothing at locations away from the workplace. Union Carbide Corp. v. Fields, 315 Ga. App. 554, 726 S.E.2d 521 (2012).

In a case in which an injured person alleged that the person was exposed to asbestos through the family's brake work on vehicles or parts manufactured by certain nonparties and by use of a joint compound product used in the construction of the person's family home, it was not error to grant summary judgment to the injured person on the defendant's nonparty defense under O.C.G.A. § 51-12-33 when the defendants failed to present evidence sufficient to create a triable issue of fact as to whether the nonparties contributed to the injuries or damages as was required to assess those entities' potential fault. Union Carbide Corp. v. Fields, 315 Ga. App. 554, 726 S.E.2d 521 (2012).

Apportioned damages not subject to any right of contribution. — In a personal injury action, the trial court and the court of appeals correctly construed O.C.G.A. § 51-12-33 to bar a motorist's cross-claims against a manufacturer for contribution and setoff. O.C.G.A § 51-12-33(b) flatly stated that apportioned damages shall not be subject to any right of contribution. McReynolds v. Krebs, 290 Ga. 850, 725 S.E.2d 584 (2012).

Jury instructions. — Trial court erred by entering judgment on the jury's first verdict in a property owner's action for trespass and nuisance because the trial court had the authority and duty to instruct the jury to reconsider the verdict once a substantial error in the charge was discovered even though the owner had not objected to the trial court's actions, and the charges and the verdict form created substantial uncertainty about the meaning of the jury's initial decision; the initial failure to charge on O.C.G.A. § 51-12-33(g) was harmful because the jury's initial decision showed an intent to reduce the owner's award by only 50 percent, not 100 percent, but once the jury was fully instructed, the jury confirmed that intent in the second verdict, and the trial court was required to enter judgment in accordance with that intent. Bailey v. Annistown Rd. Baptist Church, Inc., 301

Ga. App. 677, 689 S.E.2d 62 (2009), cert. denied, No. S10C0669, 2010 Ga. LEXIS 468 (Ga. 2010).

Trial court erred by declining to charge the jury pursuant to O.C.G.A.§ 51-12-33 because the jury should have been instructed to apportion the award of damages to a wife according to the jury's determination of the percentage of fault of her husband and a driver, if any, and there was evidence from which the jury could have concluded that both the driver and the husband were negligent; the trier of fact is required to apportion an award of damages under O.C.G.A. § 51-12-33 even if the plaintiff bears no fault. Barnett v. Farmer, 308 Ga. App. 358, 707 S.E.2d 570 (2011).

Jury instructions provided pursuant to O.C.G.A. § 51-12-33 were not error in a wrongful death action since the particular language used was not challenged, the evidence supported invocation of the instruction, and there was no showing that the particular allegations of the claim did not warrant use of that instruction. Pacheco v. Regal Cinemas, Inc., 311 Ga. App. 224, 715 S.E.2d 728 (2011).

Because any error in charging the jury about apportionment had no effect on the outcome of the trial and could not have harmed a mother, the court of appeals need not consider whether instructing the jury on apportionment actually was error; the jury returned a verdict for the owner of an apartment complex, and there was no occasion for the jury to apportion damages. Raines v. Maughan, 312 Ga. App. 303, 718 S.E.2d 135 (2011), cert. denied, No. S12C0436, 2012 Ga. LEXIS 270 (Ga. 2012).

Trial court erred in charging the jury with the pattern instruction on comparative negligence because the instruction was no longer an accurate statement of law since the statement did not require the jury to quantify the fault of the plaintiff as precisely as O.C.G.A. § 51-12-33(a), and the procedure established by the pattern charge left the parties to wonder whether the jury found comparative negligence at all and, if so, correctly reduced the damages to be awarded the plaintiff in proportion to the degree of his or her negligence; both the Suggested Pattern Jury Instructions, Vol. I: Civil Cases (4th ed.) § 60.141 and Underwood v. Atlanta & West Point R. R. Co., 105 Ga. App. at 340 (1962), the case on which the pattern charge is based, have been superseded by O.C.G.A. § 51-12-33(a), as amended in the Tort Reform Act of 2005. Specifically, the van driver was entitled to a correct charge on comparative negligence because a jury could properly conclude from the evidence that a car driver, who filed suit against the van driver, was driving too fast, that driving so fast was negligent, and that the negligence contributed to the collision. Clark v. Rush, 312 Ga. App. 333, 718 S.E.2d 555 (2011).

Trial court did not limit the jury's obligation to consider the fault of unnamed nonparties because a company provided notice that a nonparty was at fault for some damages to the owners' property, and pursuant to that notice, the trial court instructed the jury that it had to consider the liability of the nonparty when deliberating. Ingles Mkts., Inc. v. Kempler, 317 Ga. App. 190, 730 S.E.2d 444 (2012).

Mitigation evidence relevant. — In a property owner's action for trespass and nuisance, the trial court did not err in denying the owner's motion in limine to exclude evidence suggesting that the owner should have built or re-built drains on the property because, at a minimum, the evidence the owner sought to exclude was relevant to the claim of negligence in several ways, and any possible error admitting evidence of mitigation or decisions regarding the drains vis-a-vis the owner's claims of nuisance and trespass was self-induced. Bailey v. Annistown Rd. Baptist Church, Inc., 301 Ga. App. 677, 689 S.E.2d 62 (2009), cert. denied, No. S10C0669, 2010 Ga. LEXIS 468 (Ga. 2010).

Waiver of constitutional challenge. — Constitutional challenges on appeal to O.C.G.A. § 51-12-33 were waived when there was no trial court ruling shown on the issue. Pacheco v. Regal Cinemas, Inc., 311 Ga. App. 224, 715 S.E.2d 728 (2011).

Special verdict. — Tort Reform Act of 2005, O.C.G.A. § 51-12-33(a), does not explicitly state that the jury must return a special verdict identifying the percentage of fault attributable to the plaintiff, but

that is implicit, given the explicit requirements that the jury determine the percentage of fault and that the judge reduce any damages award in proportion to the percentage determined by the jury; without a special verdict, the judge could not know the percentage by which the judge is to reduce the damages award. Clark v. Rush, 312 Ga. App. 333, 718 S.E.2d 555 (2011).

Cited in Mann v. Taser Int'l, Inc., 588 F.3d 1291 (11th Cir. 2009).

ARTICLE 3

DAMAGES FOR CONVERSION OF TIMBER

51-12-50. Measure of damages for converted timber.

JUDICIAL DECISIONS

ANALYSIS

APPLICATION

Application

Insufficient evidence for recovery. — As a neighbor was liable for a third party's cutting some, but not all, of the property owners' timber, and there was no evidence from which the trial court could determine the value of the converted timber attributable to the neighbor, it properly refused to award the owners any damages. Page v. Braddy, 255 Ga. App. 124, 564 S.E.2d 538 (2002).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 17 Am. Jur. Pleading and Practice Forms, Logs and Timber, § 52.

51-12-51. Recovery by person holding security interest in land for conversion of timber; use of converted timber by owner.

JUDICIAL DECISIONS

Proof of use to which trees were put is not an element. — When a person without authority removes another person's trees in order to improve the view, there is an unauthorized exercise of ownership rights over the trees; to what specific "use" the trees are put after the unauthorized removal does not impact on the fact that in removing the trees without authority the remover has converted them to his own "uses." Thakkar v. St. Ives Country Club, 250 Ga. App. 893, 553 S.E.2d 181 (2001).

Bank that held security interest could not be forced to accept money satisfaction of its interest. — Question was whether the court could or should permit debtor to sell the timber and keep the proceeds over the objection of a bank, which held a security interest in the timber. Debtor could not withhold even part of the proceeds from the timber sale to pay administrative expenses and comply with this O.C.G.A. § 51-12-51(a), and thus, Georgia law did not authorize debtor to sell the timber as required by 11 U.S.C. § 363(f)(1); furthermore, the bank could not be forced to accept a money satisfaction of its interest in the timber because another means of relief existed, an injunc-

tion. Walton v. Gillikin (In re Gillikin), No. 09-60178, 2011 Bankr. LEXIS 5341 (Bankr. S.D. Ga. Nov. 21, 2011).

ARTICLE 4

DAMAGES IN TORT ACTIONS

51-12-70. Definitions.

RESEARCH REFERENCES

ALR. — Construction and application of state structured settlement protection acts, 27 ALR6th 323.

51-12-71. Prerequisites for transfer of structured settlement payment rights.

(a) No direct or indirect transfer of structured settlement payment rights shall be effective and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to any transferee of structured settlement payment rights unless the transfer has been approved in advance in a final court order by a court of competent jurisdiction or order of any government authority vested by law with exclusive jurisdiction over the settled claim resolved by the structured settlement based on express findings by the court or government authority that:

(1) The transfer complies with the requirements of this article and does not contravene any federal or state statute or the order of any court or any responsible administrative authority;

(2) The transfer is in the best interest of the payee taking into account the welfare and support of the payee's dependents;

(3) Not less than ten days prior to the date on which the transfer agreement is executed in writing, the transferee has provided to the payee an informational pamphlet relating to transfers of structured settlements as provided for in subsection (b) of Code Section 51-12-73, when available, and a separate disclosure statement in bold type, no smaller than 14 points, setting forth:

(A) The amounts and due dates of the structured settlement payments to be transferred;

(B) The aggregate amount of such payments;

(C) The discounted present value of such payments, together with the discount rate used in determining such discounted present value;

(D) The gross amount payable to the payee in exchange for such payments;

(E) An itemized listing of all brokers' commissions, service charges, application fees, processing fees, closing costs, filing fees, administrative fees, legal fees, notary fees and other commissions, fees, costs, expenses, and charges payable by the payee or deductible from the gross amount otherwise payable to the payee;

(F) The net amount payable to the payee after deduction of all commissions, fees, costs, expenses, and charges described in subparagraph (E) of this paragraph;

(G) The quotient (expressed as a percentage) obtained by dividing the net payment amount by the discounted present value of the payments; and

(H) The amount of any penalty and the aggregate amount of any liquidated damages (inclusive of penalties) payable by the payee in the event of any breach of the transfer agreement by the payee; and

(4) The transferee has given written notice of the transferee's name, address, and taxpayer identification number to the annuity issuer and the structured settlement obligor and has filed a copy of the notice with the court.

(b) At least 20 days before the hearing which is scheduled on an application for authorizing a transfer of structured settlement payment rights under this Code section, the transferee shall file with the court and deliver to all interested parties a notice of the proposed transfer and the application for its authorization. The notice shall include the following:

(1) A copy of the transferee's application to the court;

(2) A copy of the transfer agreement;

(3) A copy of the disclosure statement required under paragraph (3) of subsection (a) of this Code section;

(4) Notification that an interested party may support, oppose, or otherwise respond to the transferee's application, either in person or through counsel, by participating in the hearing or by submitting written comments to the court; and

(5) A rule nisi containing notification of the time and place of the hearing and notification of the manner in and the time by which any written response to the application must be filed in order to be considered by the court. A written response shall be filed within 15 days after service of the transferee's notice.

(c) Delivery of notice as required by subsection (b) of this Code section may be made as provided in Code Section 9-11-4 or by registered

or certified mail, return receipt requested. Notice by registered or certified mail is effective upon the date of delivery as shown on the return receipt. If notice by registered or certified mail is refused or returned undelivered, notice shall be delivered as provided in Code Section 9-11-4.

(d) The venue for any application brought under this Code section shall be in the county in which any transferee or transferor resides or in any county in which any of the transferees or transferors have consented to venue. (Code 1981, § 51-12-71, enacted by Ga. L. 1999, p. 853, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2003, p. 820, § 7.)

The 2003 amendment, effective July 1, 2003, designated the existing provisions as subsection (a), rewrote subsection (a), and added subsections (b) through (d).

Editor's notes. — Ga. L. 2003, p. 820, § 9, not codified by the General Assembly, provides that this Act "shall be applicable to all civil actions filed on or after July 1, 2003."

Law reviews. — For annual survey of law of torts, see 56 Mercer L. Rev. 433 (2004).

For note on the 2003 amendment to this Code section, see 20 Ga. St. U.L. Rev. 28 (2003).

51-12-72. Written transfer agreement required.

(a) Any transfer agreement of structured settlement payment rights must, in addition to the other requirements of this article, be executed in writing and filed as provided in Code Section 51-12-71. The transfer agreement shall not be so executed until after the expiration of the ten-day period provided for in paragraph (3) of subsection (a) of Code Section 51-12-71.

(b) No payee shall incur any obligation of any type with respect to a proposed transfer of structured settlement payment rights prior to the execution in writing of the transfer agreement.

(c) Any payee who executes in writing a transfer agreement shall have the right to rescind the transfer at any time within the next 21 days following the written execution of the transfer agreement or at the hearing provided for in subsection (b) of Code Section 51-12-71, whichever event occurs last. The transferee shall furnish to the payee at the time of execution of the transfer agreement a notice to the payee allowing the payee 21 days to cancel the transfer. This right to cancel shall not limit or otherwise affect the payee's right to cancel pursuant to any other provision of applicable law. The notice shall serve as the cover sheet to the transfer documents. It shall be on a separate sheet of paper with no other written or pictorial material, in at least ten-point bold type, double spaced, and shall read substantially as follows:

"NOTICE OF CANCELLATION RIGHTS:

Please read this form completely and carefully. It contains valuable cancellation rights.

You may cancel this transaction at any time prior to 5:00 P.M. of the twenty-first day following receipt of this notice or at the hearing on the application for authorization of a transfer of structured settlement payment rights, whichever event occurs last.

This cancellation right cannot be waived in any manner.

To cancel, sign this form, and mail or deliver it to the address below by 5:00 P.M. of _____ (the twenty-first day following the transaction). It is best to mail it by certified mail or statutory overnight delivery, return receipt requested, and to keep a photocopy of the signed form and your post office receipt.

Address to which cancellation is to be returned:

_____

I (we) hereby cancel this transaction.

_____

Payee's Signature

Date:

_____."

(Code 1981, § 51-12-72, enacted by Ga. L. 1999, p. 853, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2001, p. 4, § 51; Ga. L. 2003, p. 140, § 51; Ga. L. 2003, p. 820, § 8.)

The 2001 amendment, effective February 12, 2001, part of an Act to revise, modernize, and correct the Code, revised punctuation in subsection (c).

The 2003 amendments. — The first 2003 amendment, effective May 14, 2003, part of an Act to revise, modernize, and correct the Code, revised punctuation in subsection (c). The second 2003 amendment, effective July 1, 2003, in subsection (a), added "and filed as provided in Code Section 51-12-71" at the end of the first sentence and substituted "paragraph (3)" for "paragraph (2)" in the last sentence; and, in subsection (c), added "or at the hearing provided for in subsection (b) of Code Section 51-12-71, whichever event occurs last" at the end of the first sentence, added "or at the hearing on the application for authorization of a transfer of structured settlement payment rights, whichever event occurs last" at the end of the second sentence in the second paragraph in the notice form, and added a period after the date line.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2003, "of subsection (a)" was inserted following "(3)" in subsection (a).

Editor's notes. — Ga. L. 2003, p. 820, § 9, not codified by the General Assembly, provides that this Act "shall be applicable to all civil actions filed on or after July 1, 2003."

Law reviews. — For note on the 2003 amendment to this Code section, see 20 Ga. St. U.L. Rev. 28 (2003).

51-12-73. (For effective date, see note) Powers and duties of the administrator.

Delayed effective date. — This Code section, as set out in the bound volume, becomes effective only when funds are specifically appropriated for the purposes of this Act in an appropriations Act making specific reference to this Act and shall become effective when funds so appropriated become available for expenditure. No such specific appropriation was made in the 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, or 2013 sessions of the General Assembly.

51-12-74. (For effective date, see note) Actions and proceedings of administrator.

Delayed effective date. — This Code section, as set out in the bound volume, becomes effective only when funds are specifically appropriated for the purposes of this Act in an appropriations Act making specific reference to this Act and shall become effective when funds so appropriated become available for expenditure. No such specific appropriation was made in the 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, or 2013 sessions of the General Assembly.

51-12-75. (For effective date, see note) Issuance of administrative order; administrative review; final order; penalty.

Delayed effective date. — This Code section, as set out in the bound volume, becomes effective only when funds are specifically appropriated for the purposes of this Act in an appropriations Act making specific reference to this Act and shall become effective when funds so appropriated become available for expenditure. No such specific appropriation was made in the 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, or 2013 sessions of the General Assembly.

CHAPTER 13

RECOVERY IN MEDICAL MALPRACTICE ACTIONS

Sec.

Effective date. — This chapter became effective February 16, 2005.

Editor's notes. — Ga. L. 2005, p. 1, § 1, not codified by the General Assembly, provides that: "The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to

locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act."

Ga. L. 2005, p. 1, § 15(b), not codified by the General Assembly, provides that this chapter shall apply only with respect to causes of action arising on or after February 16, 2005, and any prior causes of action shall continue to be governed by prior law.

51-13-1. Definitions; maximum liability; allowance for periodic payments.

(a) As used in this Code section, the term:

(1) "Claimant" means a person, including a decedent's estate, who seeks or has sought recovery of damages in a medical malpractice action. All persons claiming to have sustained damages as the result of the bodily injury or death of a single person are considered a single claimant.

(2) "Health care provider" means any person licensed under Chapter 9, 10A, 11, 11A, 26, 28, 30, 33, 34, 35, 39, or 44 of Title 43. The term shall also include any corporation, professional corporation, partnership, limited liability company, limited liability partnership, authority, or other entity comprised of such health care providers.

(3) "Medical facility" means any institution or medical facility licensed under Chapter 7 of Title 31 or any combination thereof under common ownership, operation, or control.

(4) "Noneconomic damages" means damages for physical and emotional pain, discomfort, anxiety, hardship, distress, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, injury to reputation, and all other nonpecuniary losses of any kind or nature. This term does not include past or future:

(A) Medical expenses, including rehabilitation and therapy;

(B) Wages or earnings capacity;

(C) Income;

(D) Funeral and burial expenses;

(E) The value of services performed by the injured in the absence of the injury or death including those domestic and other necessary services performed without compensation; or

(F) Other monetary expenses.

(b) In any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against one or more health care providers, the total amount recoverable by a claimant for noneconomic damages in such action shall be limited to an amount not to exceed $350,000.00, regardless of the number of defendant health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based.

(c) In any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against a single medical facility, inclusive of all persons and entities for which vicarious liability theories may apply, the total amount recoverable by a claimant for noneconomic damages in such action shall be limited to an amount not to exceed $350,000.00, regardless of the number of separate causes of action on which the claim is based.

(d) In any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against more than one medical facility, inclusive of all persons and entities for which vicarious liability theories may apply, the total amount recoverable by a claimant for noneconomic damages in such action shall be limited to an amount not to exceed $350,000.00 from any single medical facility and $700,000.00 from all medical facilities, regardless of the number of defendant medical facilities against whom the claim is asserted or the number of separate causes of action on which the claim is based.

(e) In applying subsections (b), (c), and (d) of this Code section, the aggregate amount of noneconomic damages recoverable under such subsections shall in no event exceed $1,050,000.00.

(f) In any medical malpractice action, if an award of future damages equaling or exceeding $350,000.00 is made against any party in the action, the trial court shall, upon the request of any party, issue an order providing that such damages be paid by periodic payments. Such periodic payments shall be funded through an annuity policy with the premium for such annuity equal to the amount of the award for future damages. (Code 1981, § 51-13-1, enacted by Ga. L. 2005, p. 1, § 13/SB 3.)

Editor's notes. — Ga. L. 2005 p. 1, § 14, not codified by the General Assembly, provides for severability.

Law reviews. — For article on 2005 enactment of this Code section, see 22 Ga. St. U.L. Rev. 221 (2005). For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005). For article, "Of Frivolous Litigation and Runaway Juries: A View from the Bench," see 41 Ga. L. Rev. 431 (2007). For annual survey of law on torts, see 62 Mercer L. Rev. 317 (2010). For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010). For article, "Caps Off to Juries: Noneconomic Damage Caps in Medical Malpractice Cases Ruled Unconstitutional," see 62 Mercer L. Rev. 1315 (2011).

For comment, "Where Do We Go From Here? The Future of Caps on Noneconomic Medical Malpractice Damages in Georgia," see 28 Ga. St. U.L. Rev. 1341 (2012).

JUDICIAL DECISIONS

Constitutionality. — Statutory limitation of awards of noneconomic damages in medical malpractice cases to a predetermined amount was unconstitutional because it violated the right to a jury trial guaranteed by Ga. Const. 1983, Art. 1, Sec. 1, Para. 11(a), and the statute was wholly void and of no force and effect from the date of the statute's enactment. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 286 Ga. 731, 691 S.E.2d 218 (2010).

CHAPTER 14

ASBESTOS AND SILICA CLAIMS

Effective date. — This chapter became effective May 1, 2007.

Editor's notes. — Ga. L. 2007, p. 4, § 1, effective May 1, 2007, repealed the Code sections at this chapter and enacted the current chapter. The former chapter consisted of Code Sections 51-14-1 through 51-14-10, relating to asbestos claims and silica claims, and was based on Ga. L. 2005, p. 145, § 1/HB 416 and Ga. L. 2006, p. 72, § 51/SB 465.

Ga. L. 2007, p. 4, § 3, not codified by the General Assembly, provides for additional severability.

Ga. L. 2007, p. 4, § 4, not codified by the General Assembly, provides that this chapter shall apply to certain accrued or future accruing asbestos claims or silica claims in which trial has not commenced as of May 1, 2007, in accordance with its terms.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Asbestosis, 45 POF2d 1.

51-14-1. Legislative findings and purpose.

(a) The General Assembly finds that:

(1) Asbestos is a mineral that was widely used prior to the 1980's for insulation, fire-proofing, and other purposes;

(2) Many American workers and others were exposed to asbestos, especially during and after World War II, at shipyards and other sites, prior to the advent of regulation by the United States Occupational Safety and Health Administration in the early 1970's;

(3) Exposure to asbestos is associated with various types of cancer, including mesothelioma, as well as nonmalignant conditions such as asbestosis and diffuse pleural thickening;

(4) Diseases caused by asbestos exposure often have long latency periods;

(5) Silica is a naturally occurring mineral and is the second most common constituent of the earth's crust. Crystalline silica in the form of quartz is present in sand, gravel, soil, and rocks;

(6) Silica related illnesses, including silicosis, can develop from the inhalation of respirable silica dust. Silicosis was widely recognized as an occupational disease many years ago;

(7) Concerns about statutes of limitations may prompt unimpaired asbestos and silica claimants to bring lawsuits to protect their ability to recover for their potentially progressive occupational disease;

(8) It is proper for the General Assembly to support and protect the Georgia courts from the massive litigation expense and the crowding of trial dockets caused by asbestos and silica litigation;

(9) The cost of compensating exposed individuals who are not sick and legal costs spent on their claims jeopardize recoveries both now and in the future by people with cancer or other serious asbestos related injuries; threaten the savings, retirement benefits, and jobs of current and retired employees of the defendants; and adversely affect the communities in which the defendants operate;

(10) In February, 2003, the American Bar Association Commission on Asbestos Litigation, with input from ten of the nation's most prominent physicians in the area of pulmonary function, adopted the "ABA Standard For Non-Malignant Asbestos-Related Disease Claims," which sets forth medical criteria for demonstrating asbestos

related impairment that provide the underlying framework for the criteria set forth in this chapter and in similar legislation adopted in several other states;

(11) Ohio, Florida, Texas, Kansas, South Carolina, and Tennessee have enacted legislation similar to this chapter that, among other things, sets medical criteria governing asbestos or silica claims or both, tolls statutes of limitations, and requires persons alleging nonmalignant disease claims to demonstrate physical impairment as a prerequisite to filing or maintaining such claims; and

(12) Sound public policy requires deferring the claims of persons exposed to asbestos or silica and who are not presently impaired in order to give priority to those cases that involve claims of actual and current conditions of impairment; preserve compensation for people with cancer and other serious injuries; and safeguard the jobs, benefits, and savings of workers.

(b) It is the purpose of this chapter to:

(1) Give priority to claimants who can demonstrate actual physical harm or illness caused by asbestos or silica;

(2) Preserve the rights of claimants to pursue asbestos or silica claims if an exposed person becomes sick in the future;

(3) Enhance the ability of the courts to supervise and control asbestos litigation and silica litigation; and

(4) Conserve resources to allow compensation of claimants who have cancer and others who are impaired as a result of exposure to asbestos or silica while securing the right to similar compensation for those who may suffer physical impairment in the future. (Code 1981, § 51-14-1, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

Law reviews. — For survey article on product liability law, see 59 Mercer L. Rev. 331 (2007). For survey article on trial practice and procedure, see 59 Mercer L. Rev. 423 (2007).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former O.C.G.A. Ch. 14, T. 51, are included in the annotations for this Code section.

Construction. — Superior and state courts did not err in entering nearly identical orders which held that because O.C.G.A. § 51-14-1 et seq. required asbestos plaintiffs to provide proof that exposure to asbestos was a substantial contributing factor in their medical condition, it unconstitutionally affected an employee's substantive rights by establishing a new element which did not exist when the original cause of action accrued, and hence, could not be applied retrospectively; moreover, because these requirements and limitations were the heart of the statute, their severance would result in a statute that failed to correspond to the main legislative purpose, or give effect

to that purpose. DaimlerChrysler v. Ferrante, 281 Ga. 273, 637 S.E.2d 659 (2006).

Expert's opinion on causation properly excluded. — Opinion of the plaintiff's expert, a pathologist, failed the first element of Daubert because the expert relied on the theory that any exposure to the asbestos in the defendant's product would contribute to the development of mesothelioma, yet the expert testified that the theory was essentially untestable and had not been tested. Thus, the expert's testimony was properly excluded under former O.C.G.A. § 24-9-67.1(b)(2) (see now O.C.G.A. § 24-7-702) since the testimony was not the product of reliable principles and methods. Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537 (2011).

RESEARCH REFERENCES

ALR. — Retroactive application of state statutes concerning asbestos liability, 41 ALR6th 445.

51-14-2. Applicability.

This chapter applies to any claim defined in this chapter as an asbestos claim or as a silica claim. (Code 1981, § 51-14-2, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former O.C.G.A. Ch. 14, T. 51, are included in the annotations for this Code section.

Construction. — Superior and state courts did not err in entering nearly identical orders which held that because O.C.G.A. § 51-14-1 et seq. required asbestos plaintiffs to provide proof that exposure to asbestos was a substantial contributing factor in their medical condition, it unconstitutionally affected an employee's substantive rights by establishing a new element which did not exist when the original cause of action accrued, and hence, could not be applied retrospectively; moreover, because these requirements and limitations were the heart of the statute, their severance would result in a statute that failed to correspond to the main legislative purpose, or give effect to that purpose. DaimlerChrysler v. Ferrante, 281 Ga. 273, 637 S.E.2d 659 (2006).

51-14-3. Definitions.

As used in this chapter, the term:

(1) "Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated or altered, including but not limited to all minerals defined as asbestos in 29 C.F.R. 1910.

(2)(A) "Asbestos claim" means any claim, wherever or whenever made, for damages, losses, indemnification, contribution, loss of consortium, or other relief arising out of, based on, or in any way related to the health effects of exposure to asbestos, including, but not limited to:

(i) Any claim, to the extent recognized by applicable state law now or in the future, for:

(I) Personal injury or death;

(II) Mental or emotional injury;

(III) Risk or fear of disease or other injury;

(IV) The costs of medical monitoring or surveillance; or

(V) Damage or loss caused by the installation, presence, or removal of asbestos; and

(ii) Any claim made by or on behalf of an exposed person or based on that exposed person's exposure to asbestos, including a representative, spouse, parent, child, or other relative of the exposed person.

(B) "Asbestos claim" shall not mean a claim brought under:

(i) A workers' compensation law administered by this state to provide benefits, funded by a responsible employer or its insurance carrier, for occupational diseases or injuries or for disability or death caused by occupational diseases or injuries;

(ii) The Act of April 22, 1908, known as the Federal Employers' Liability Act, 45 U.S.C. Section 51, et seq.;

(iii) The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sections 901-944, 948-950; or

(iv) The Federal Employees Compensation Act, 5 U.S.C. Chapter 81.

(3) "Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos.

(4) "Board certified internist" means a qualified physician licensed to practice medicine who is currently certified by the American Board of Internal Medicine.

(5) "Board certified occupational medicine physician" means a qualified physician licensed to practice medicine who is currently certified in the subspecialty of occupational medicine by the American Board of Preventive Medicine.

(6) "Board certified oncologist" means a qualified physician licensed to practice medicine who is currently certified in the subspecialty of medical oncology by the American Board of Internal Medicine.

(7) "Board certified pathologist" means a qualified physician licensed to practice medicine who holds primary certification in ana-

tomic pathology or combined anatomic or clinical pathology from the American Board of Pathology and whose professional practice is principally in the field of pathology and involves regular evaluation of pathology materials obtained from surgical or post-mortem specimens.

(8) "Board certified pulmonologist" means a qualified physician licensed to practice medicine who is currently certified in the subspecialty of pulmonary medicine by the American Board of Internal Medicine.

(9) "Certified B-reader" means a qualified physician who has successfully passed the B-reader certification examination for X-ray interpretation sponsored by the National Institute for Occupational Safety and Health and whose certification was current at the time of any readings required by this chapter.

(10) "Chest X-rays" means films taken in two views (PA and Lateral) for reading in accordance with the radiological standards established by the International Labor Office, as interpreted by a certified B-reader.

(11) "Claimant" means a party seeking recovery of damages for an asbestos claim or silica claim, including the exposed person, any other plaintiff making a claim as a result of the exposed person's exposure to asbestos or silica, counterclaimant, cross-claimant, or third-party plaintiff. If a claim is brought through or on behalf of an estate, the term includes the claimant's decedent; if a claim is brought through or on behalf of a minor or incompetent, the term includes the claimant's parent or guardian.

(12) "Exposed person" means any person whose exposure to asbestos or silica is the basis for an asbestos claim or a silica claim.

(13) "FEV-1" means forced expiratory volume in the first second, which is the maximal volume of air expelled in one second during performance of simple spirometric tests.

(14) "FVC" means forced vital capacity, which is the maximal volume of air expired with maximum effort from a position of full inspiration.

(15) "ILO system" means the radiological ratings of the International Labor Office set forth in *Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses*, revised edition, as amended from time to time by the International Labor Office.

(16) "Lower limit of normal" means the fifth percentile of healthy populations based on age, height, and gender, as referenced in the

American Medical Association's *Guides to the Evaluation of Permanent Impairment*, fifth edition, as amended from time to time by the American Medical Association.

(17) In the context of an asbestos claim, "prima-facie evidence of physical impairment" means:

(A) For an asbestos claim that accrued before April 12, 2005:

(i) For an asbestos claim alleging mesothelioma: that a claimant alleges mesothelioma caused by exposure to asbestos, and no further prima-facie evidence of physical impairment shall be required;

(ii) For an asbestos claim alleging cancer other than mesothelioma: that a physician licensed to practice medicine (who need not be a "qualified physician" as defined in this Code section) has signed a medical report certifying to a reasonable degree of medical probability that the exposed person's exposure to asbestos was a contributing factor to the diagnosed cancer other than mesothelioma and attaching whatever evidence the physician relied upon in determining that the exposed person has or had an asbestos related cancer; and

(iii) For an asbestos claim alleging nonmalignant injury: that a physician licensed to practice medicine (who need not be a "qualified physician" as defined in this Code section) has signed a medical report certifying to a reasonable degree of medical probability that the exposed person's exposure to asbestos was a contributing factor to the diagnosed nonmalignant asbestos injury and attaching whatever evidence the physician relied upon in determining that the exposed person has or had a nonmalignant asbestos injury;

(B) For an asbestos claim that accrued on or after May 1, 2007:

(i) For an asbestos claim alleging mesothelioma: that a claimant alleges mesothelioma caused by exposure to asbestos, and no further prima-facie evidence of physical impairment shall be required;

(ii) For an asbestos claim alleging cancer other than mesothelioma: that a board certified internist, board certified pulmonologist, board certified pathologist, board certified occupational medicine physician, or board certified oncologist has signed a medical report certifying to a reasonable degree of medical probability that the exposed person has or had a cancer other than mesothelioma; that the cancer is a primary cancer; that exposure to asbestos was a substantial contributing factor to the diagnosed cancer; and that other potential causes (such as

smoking) were not the sole or most likely cause of the injury at issue;

(iii) For an asbestos claim alleging nonmalignant injury: that a board certified internist, board certified pulmonologist, board certified pathologist, board certified occupational medicine physician, or board certified oncologist has signed a medical report stating that the exposed person suffers or suffered from a nonmalignant asbestos injury and:

(I) Verifying that the doctor signing the medical report or a medical professional or professionals employed by and under the direct supervision and control of that doctor has taken histories as defined below or, alternatively, confirming that the signing doctor is relying on such histories taken or obtained by another physician or physicians who actually treated the exposed person or who had a doctor-patient relationship with the exposed person or by a medical professional or professionals employed by and under the direct supervision and control of such other physician or physicians, with such histories to consist of the following:

(a) A detailed occupational and exposure history from the exposed person or, if the exposed person is deceased or incapable of providing such history, from the person or persons most knowledgeable about the exposures that form the basis for the asbestos claim. The history shall include all of the exposed person's principal employments and his or her exposures to airborne contaminants that can cause pulmonary impairment, including, but not limited to, asbestos, silica, and other disease-causing dusts, and the nature, duration, and level of any such exposure; and

(b) A detailed medical and smoking history from the exposed person or, if the exposed person is deceased or incapable of providing such history, from the person or persons most knowledgeable about the exposed person's medical and smoking history, or the exposed person's medical records, or both, that includes a thorough review of the exposed person's past and present medical problems and their most probable cause;

(II) Setting out the details of the exposed person's occupational, medical, and smoking histories and verifying that at least 15 years have elapsed between the exposed person's first exposure to asbestos and the time of diagnosis;

(III) Verifying that the exposed person has:

(a) An ILO quality 1 chest X-ray taken in accordance with all applicable state and federal regulatory standards, and

that the X-ray has been read by a certified B-reader according to the ILO system of classification as showing bilateral small irregular opacities (s, t, or u) graded 1/1 or higher or bilateral diffuse pleural thickening graded b2 or higher including blunting of the costophrenic angle; provided, however, that in a death case where no pathology is available, the necessary radiologic findings may be made with a quality 2 film if a quality 1 film is not available; or

(b) Pathological asbestosis graded 1(B) or higher under the criteria published in the Asbestos-Associated Diseases, Special Issue of the *Archives of Pathological and Laboratory Medicine*, Volume 106, Number 11, Appendix 3, as amended from time to time;

(IV) Verifying that the exposed person has pulmonary impairment related to asbestos as demonstrated by pulmonary function testing, performed using equipment, methods of calibration, and techniques that meet the criteria incorporated in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, fifth edition, and reported as set forth in 20 C.F.R. 404, Subpt. P. App 1, Part (A) Section 3.00 (E) and (F), as amended from time to time by the American Medical Association, and the interpretative standards of the American Thoracic Society, *Lung Function Testing: Selection of Reference Values and Interpretive Strategies*, 144 Am. Rev. Resp. Dis. 1202-1218 (1991), as amended from time to time by the American Thoracic Society, that shows:

(a) Forced vital capacity below the lower limit of normal and FEV1/FVC ratio, using actual values, at or above the lower limit of normal; or

(b) Total lung capacity, by plethysmography or timed gas dilution, below the lower limit of normal,

except that this subdivision (17)(B)(iii)(IV) shall not apply if the medical report includes the pathological evidence set forth in clause (17)(B)(iii)(III)(b) of this Code section;

(V)(a) Exception to pulmonary function test requirement in subdivision (17)(B)(iii)(IV) of this Code section: If the doctor signing the medical report states in the medical report that the exposed person's medical condition or process prevents the pulmonary function test described in subdivision (17)(B)(iii)(IV) of this Code section from being performed or makes the results of such test an unreliable indicator of physical impairment, a board certified internist, board certified pulmonologist, board certified pathologist, board certi-

fied occupational medicine physician, or board certified oncologist (none of whom need be a "qualified physician" as defined in this Code section), independent from the physician signing the report required in this subdivision, must provide a report which states to a reasonable degree of medical probability that the exposed person has or had a nonmalignant asbestos related condition causing physical impairment equivalent to that required in subdivision (17)(B)(iii)(IV) of this Code section and states the reasons why the pulmonary function test could not be performed or would be an unreliable indicator of physical impairment.

(b) Exception to X-ray requirement in clause (17)(B)(iii)(III)(a) of this Code section: Alternatively and not to be used in conjunction with clause (17)(B)(iii)(V)(a) of this Code section, if the doctor signing the medical report states in the medical report that the exposed person's medical condition or process prevents a physician from being able to diagnose or evaluate that exposed person sufficiently to make a determination as to whether that exposed person meets the requirements of clause (17)(B)(iii)(III)(a) of this Code section, the claimant may serve on each defendant a report by a board certified internist, board certified pulmonologist, board certified pathologist, board certified occupational medicine physician, or board certified oncologist (none of whom need be a "qualified physician" as defined in this Code section) that:

(1) Verifies that the physician has or had a doctor patient relationship with the exposed person;

(2) Verifies that the exposed person has or had asbestos related pulmonary impairment as demonstrated by pulmonary function testing showing:

(A) Forced vital capacity below the lower limit of normal and total lung capacity, by plethysmography, below the lower limit of normal; or

(B) Forced vital capacity below the lower limit of normal and FEV1/FVC ratio (using actual values) at or above the lower limit of normal; and

(3) Verifies that the exposed person has a chest X-ray and computed tomography scan or high resolution computed tomography scan read by the physician or a board certified internist, board certified pulmonologist, board certified pathologist, board certified occupational medicine physician, board certified oncologist, or board certified

radiologist (none of whom need be a "qualified physician" as defined in this Code section) showing either bilateral pleural disease or bilateral parenchymal disease diagnosed and reported as being a consequence of asbestos exposure; and

(VI) Verifies that the doctor signing the medical report has concluded to a reasonable degree of medical probability that exposure to asbestos was a substantial contributing factor to the exposed person's physical impairment.

Copies of the B-reading, the pulmonary function tests, including printouts of the flow volume loops and all other elements required to demonstrate compliance with the equipment, quality, interpretation, and reporting standards set forth in this paragraph (17), the medical report (in the form of an affidavit as required by subparagraph (A) of paragraph (2) of Code Section 51-14-6), and all other required reports shall be submitted as required by this chapter. All such reports, as well as all other evidence used to establish prima-facie evidence of physical impairment, must comply, to the extent applicable, with the technical recommendations for examinations, testing procedures, quality assurance, quality controls, and equipment in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, fifth edition, as amended from time to time by the American Medical Association, and the most current version of the Official Statements of the American Thoracic Society regarding lung function testing. Testing performed in a hospital or other medical facility that is fully licensed and accredited by all appropriate regulatory bodies in the state in which the facility is located is presumed to meet the requirements of this chapter. This presumption may be rebutted by evidence demonstrating that the accreditation or licensing of the hospital or other medical facility has lapsed or by providing specific facts demonstrating that the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment have not been followed. All such reports, as well as all other evidence used to establish prima-facie evidence of physical impairment, must not be obtained through testing or examinations that violate any applicable law, regulation, licensing requirement, or medical code of practice and must not be obtained under the condition that the exposed person retain legal services in exchange for the examination, testing, or screening. Failure to attach the required reports or demonstration by any party that the reports do not satisfy the standards set forth in this paragraph (17) shall result in the dismissal of the asbestos claim, without prejudice, upon motion of any party.

(18) In the context of a silica claim, "prima-facie evidence of physical impairment" means:

(A) For a silica claim that accrued before April 12, 2005, that a physician licensed to practice medicine (who need not be a "qualified physician" as defined in this Code section) has signed a medical report certifying to a reasonable degree of medical probability that the exposed person's exposure to silica was a contributing factor to the claimed injury and attached whatever evidence the physician relied upon in determining that the exposed person has or had a silica related injury; and

(B) For a silica claim that accrued on or after May 1, 2007:

(i) A medical report asserting that the exposed person has or had a silica related lung cancer and:

(I) Certifying to a reasonable degree of medical probability that the cancer is a primary lung cancer; and

(II) Signed by a board certified internist, board certified pulmonologist, board certified pathologist, board certified occupational medicine physician, or board certified oncologist stating to a reasonable degree of medical probability that exposure to silica was a substantial contributing factor to the lung cancer with underlying silicosis demonstrated by an X-ray that has been read by a certified B-reader according to the ILO system of classification as showing bilateral nodular opacities (p, q, or r) occurring primarily in the upper lung fields, graded 1/1 or higher, and that the lung cancer was not more probably the sole result of causes other than the silica exposure revealed by the exposed person's occupational, silica exposure, medical, and smoking histories;

(ii) A medical report asserting that the exposed person has or had silica related progressive massive fibrosis or acute silicoproteinosis, or silicosis complicated by documented tuberculosis, signed by a board certified internist, board certified pulmonologist, board certified pathologist, board certified occupational medicine physician, or board certified oncologist; or

(iii) A medical report signed by a board certified internist, board certified pulmonologist, board certified pathologist, board certified occupational medicine physician, or board certified oncologist stating that the exposed person suffers from other stages of nonmalignant disease related to silicosis other than those set forth in divisions (i) and (ii) of this subparagraph, and:

(I) Verifying that the doctor signing the medical report or a medical professional or professionals employed by and under the direct supervision and control of that doctor has taken histories as defined below or, alternatively, confirming that the

signing doctor is relying on such histories taken or obtained by another physician or physicians who actually treated the exposed person or who had a doctor-patient relationship with the exposed person or by a medical professional or professionals employed by and under the direct supervision and control of such other physician or physicians, with such histories to consist of the following:

(a) A detailed occupational and exposure history from the exposed person or, if the exposed person is deceased or incapable of providing such history, from the person or persons most knowledgeable about the exposures that form the basis for the silica claim. The history shall include all of the exposed person's principal employments and his or her exposures to airborne contaminants that can cause pulmonary impairment, including, but not limited to, asbestos, silica, and other disease-causing dusts, and the nature, duration, and level of any such exposure; and

(b) A detailed medical and smoking history from the exposed person or, if the exposed person is deceased or incapable of providing such history, from the person or persons most knowledgeable about the exposed person's medical and smoking history, or the exposed person's medical records, or both, that includes a thorough review of the exposed person's past and present medical problems and their most probable cause;

(II) Setting out the details of the exposed person's occupational, medical, and smoking histories and verifying a sufficient latency period for the applicable stage of silicosis;

(III) Verifying that the exposed person has at least Class 2 or higher impairment due to silicosis, as set forth in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, fifth edition, as amended from time to time by the American Medical Association and:

(a) Has an ILO quality 1 chest X-ray taken in accordance with all applicable state and federal regulatory standards, and that the X-ray has been read by a certified B-reader according to the ILO system of classification as showing bilateral nodular opacities (p, q, or r) occurring primarily in the upper lung fields, graded 1/1 or higher; provided, however, that in a death case where no pathology is available, the necessary radiologic findings may be made with a quality 2 film if a quality 1 film is not available; or

(b) Has pathological demonstration of classic silicotic nodules exceeding 1 centimeter in diameter as set forth in 112 *Archives of Pathological & Laboratory Medicine* 7 (July 1988), as amended from time to time; and

(IV) Verifying that the doctor signing the medical report has concluded to a reasonable degree of medical probability that the exposure to silica was a substantial contributing factor to the exposed person's physical impairment.

Copies of the B-reading, the pulmonary function tests, including printouts of the flow volume loops and all other elements required to demonstrate compliance with the equipment, quality, interpretation, and reporting standards set forth in this paragraph (18), and the medical report (in the form of an affidavit as required by subparagraph (A) of paragraph (2) of Code Section 51-14-6), and all other required reports shall be submitted as required by this chapter. All such reports, as well as all other evidence used to establish prima-facie evidence of physical impairment, must comply, to the extent applicable, with the technical recommendations for examinations, testing procedures, quality assurance, quality controls, and equipment in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, fifth edition, as amended from time to time by the American Medical Association, and the most current version of the Official Statements of the American Thoracic Society regarding lung function testing. Testing performed in a hospital or other medical facility that is fully licensed and accredited by all appropriate regulatory bodies in the state in which the facility is located is presumed to meet the requirements of this chapter. This presumption may be rebutted by evidence demonstrating that the accreditation or licensing of the hospital or other medical facility has lapsed or by providing specific facts demonstrating that the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment have not been followed. All such reports, as well as all other evidence used to establish prima-facie evidence of physical impairment, must not be obtained through testing or examinations that violate any applicable law, regulation, licensing requirement, or medical code of practice, and must not be obtained under the condition that the exposed person retain legal services in exchange for the examination, testing, or screening. Failure to attach the required reports or demonstration by any party that the reports do not satisfy the standards set forth in this paragraph (18) shall result in the dismissal of the silica claim, without prejudice, upon motion of any party.

(19) "Qualified physician" means a medical doctor, who:

(A) Spends no more than 35 percent of his or her professional practice time in providing consulting or expert services in connec-

tion with actual or potential civil actions, and whose medical group, professional corporation, clinic, or other affiliated group earns not more than 50 percent of its revenues from providing such services; provided, however, that the trial court, in its discretion, may allow a physician who meets the other requirements of this chapter but does not meet the time and revenue requirements of this subparagraph to submit a report required by this chapter if the trial court first makes an evidentiary finding (after all parties have had a reasonable opportunity to present evidence) that it would be manifestly unjust not to allow the physician at issue to submit the report and makes specific and detailed findings, setting forth the bases therefor, that the physician's opinions appear to be reliable medical opinions in that they are supported by documented, reliable medical evidence that was obtained through testing or examinations that comply with and do not violate any applicable law, regulation, licensing requirement, or medical code of practice and that the opinions are not the product of bias or the result of financial influence due to his or her role as a paid expert. The cost of retaining another physician who is qualified pursuant to this subparagraph for the purpose of submitting a report required by this chapter may not be considered in determining manifest injustice, but the availability or unavailability of other physicians who meet the time and revenue requirements of this subparagraph shall be considered as a relevant factor; and

(B) Does not require as a condition of diagnosing, examining, testing, screening, or treating the exposed person that legal services be retained by the exposed person or any other person pursuing an asbestos or silica claim based on the exposed person's exposure to asbestos or silica.

The board certified internist, board certified pulmonologist, board certified pathologist, board certified occupational medicine physician, or board certified oncologist who submits a report under this chapter may be an expert witness retained by counsel for the exposed person or claimant, so long as the physician otherwise meets the requirements of this chapter and any other applicable Code sections governing the qualifications of expert witnesses.

(20) "Silica" means a group of naturally occurring crystalline forms of silicon dioxide, including, but not limited to, quartz and silica sand, whether in the form of respirable free silica or any quartz-containing or crystalline silica-containing dust, in the form of a quartz-containing by-product or crystalline silica-containing by-product, or dust released from individual or commercial use, release, or disturbance of silica sand, silicon dioxide, or crystalline-silica containing media, consumables, or materials.

(21)(A) "Silica claim" means any claim, wherever or whenever made, for damages, losses, indemnification, contribution, loss of consortium, or other relief arising out of, based on, or in any way related to the health effects of exposure to silica, including, but not limited to:

(i) Any claim, to the extent recognized by applicable state law now or in the future, for:

(I) Personal injury or death;

(II) Mental or emotional injury;

(III) Risk or fear of disease or other injury; or

(IV) The costs of medical monitoring or surveillance; and

(ii) Any claim made by or on behalf of an exposed person or based on that exposed person's exposure to silica, including a representative, spouse, parent, child, or other relative of the exposed person.

(B) "Silica claim" shall not mean a claim brought under:

(i) A workers' compensation law administered by this state to provide benefits, funded by a responsible employer or its insurance carrier, for occupational diseases or injuries or for disability or death caused by occupational diseases or injuries;

(ii) The Act of April 22, 1908, known as the Federal Employers' Liability Act, 45 U.S.C. Section 51, et seq.;

(iii) The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sections 901-944, 948-950; or

(iv) The Federal Employees Compensation Act, 5 U.S.C. Chapter 81.

(22) "Silicosis" means nodular interstitial fibrosis of the lung produced by inhalation of silica.

(23) "Substantial contributing factor" means that exposure to asbestos or silica took place on a regular basis over an extended period of time and in close proximity to the exposed person and was a factor without which the physical impairment in question would not have occurred.

(24) "Total lung capacity" means the volume of gas contained in the lungs at the end of a maximal inspiration. (Code 1981, § 51-14-3, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2007, "subparagraph" was substituted for "paragraph" in division (18)(B)(iii).

JUDICIAL DECISIONS

Cited in Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537 (2011).

RESEARCH REFERENCES

ALR. — Retroactive application of state statutes concerning asbestos liability, 41 ALR6th 445.

51-14-4. Prima-facie evidence of physical impairment a prerequisite of asbestos or silica claims.

(a) Prima-facie evidence of physical impairment of the exposed person as defined in paragraph (17) or (18) of Code Section 51-14-3 shall be an essential element of an asbestos claim or silica claim.

(b) In order to bring or maintain an asbestos claim or silica claim, the claimant shall submit prima-facie evidence of physical impairment in accordance with the requirements of this chapter. (Code 1981, § 51-14-4, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

JUDICIAL DECISIONS

Editor's note. — In light of the similarity of the provisions, decisions under former O.C.G.A. Ch. 14, T. 51, are included in the annotations for this Code section.

Construction. — Superior and state courts did not err in entering nearly identical orders which held that because O.C.G.A. § 51-14-1 et seq. required asbestos plaintiffs to provide proof that exposure to asbestos was a substantial contributing factor in their medical condition, it unconstitutionally affected an employee's substantive rights by establishing a new element which did not exist when the original cause of action accrued, and hence, could not be applied retrospectively; moreover, because these requirements and limitations were the heart of the statute, their severance would result in a statute that failed to correspond to the main legislative purpose, or give effect to that purpose. DaimlerChrysler v. Ferrante, 281 Ga. 273, 637 S.E.2d 659 (2006).

Cited in Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537 (2011).

51-14-5. When limitations period begins to run.

Notwithstanding any other provision of law, with respect to any asbestos claim or silica claim not barred as of May 1, 2007, the limitations period shall not begin to run until the exposed person, or any plaintiff making an asbestos claim or silica claim based on the exposed person's exposure to asbestos or silica, obtains, or through the exercise of reasonable diligence should have obtained, prima-facie evidence of physical impairment, as defined in paragraph (17) or (18) of Code Section 51-14-3. (Code 1981, § 51-14-5, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

51-14-6. Dismissal for failure to establish prima-facie evidence of physical impairment with respect to an asbestos claim or silica claim; procedure; evidentiary requirements.

Subject to the provisions of Code Section 51-14-12:

(1) Any asbestos claim or silica claim pending in this state on May 1, 2007, shall be dismissed within 180 days after May 1, 2007, without prejudice unless:

(A) All parties stipulate by no less than 60 days prior to the commencement of trial that the plaintiff has established prima-facie evidence of physical impairment with respect to an asbestos claim or silica claim; or

(B) The trial court in which the complaint was initially filed issues an order that the plaintiff has established prima-facie evidence of physical impairment with respect to an asbestos claim or silica claim. Such an order shall be issued only if the following conditions and procedures are met:

(i) By no less than 60 days prior to the commencement of trial, the plaintiff files with the trial court and serves on each defendant named in the complaint or on counsel designated by each defendant the medical documentation necessary to establish prima-facie evidence of physical impairment;

(ii) Within 30 days of service of plaintiff's documentation establishing prima-facie evidence of physical impairment, any defendant may file an opposition with the trial court challenging plaintiff's prima-facie evidence of physical impairment. To the extent any such opposition is based upon the medical opinion of a licensed physician, that physician shall be a qualified physician, as that term is defined in subparagraph (A) of paragraph (19) of Code Section 51-14-3, and shall be either a board certified internist, a board certified pathologist, a board certified pulmonologist, a board certified occupational medicine physician, a board certified oncologist, or a certified B-reader. Defendant's opposition shall be filed with the trial court and served on plaintiff's counsel and each defendant;

(iii) If a defendant does not file an opposition within the time permitted, the trial court shall determine if the plaintiff has established prima-facie evidence of physical impairment in a timely manner based on the papers and documentation submitted to the trial court;

(iv) If a defendant files an objection, then within ten days of service of defendant's opposition, the plaintiff may file a reply

with the trial court. The reply must be served on each defendant; and

(v) The trial court shall determine if the plaintiff has established prima-facie evidence of physical impairment in a timely manner based on the papers and documentation submitted to the trial court. A hearing will be conducted only if the trial court so orders on its own motion or if, in the exercise of discretion, the trial court grants a party's request for a hearing. No testimony shall be taken at the hearing. A decision of the trial court not to grant a request for a hearing may not be appealed and does not constitute reversible error. If the trial court determines that the plaintiff has failed to establish prima-facie evidence of physical impairment, it shall dismiss the plaintiff's complaint without prejudice;

In the event a trial is scheduled to commence in less than 60 days after May 1, 2007, a trial court can shorten the deadlines contained in this paragraph as necessary in order to make a determination regarding the prima-facie evidence of physical impairment before trial commences; and

(2)(A) The plaintiff in any asbestos claim or silica claim filed in this state on or after May 1, 2007, shall file together with the complaint a medical report (which shall be in the form of an affidavit) and accompanying documentation setting forth the medical findings necessary to establish prima-facie evidence of physical impairment as provided in paragraph (17) or (18) of Code Section 51-14-3. In addition, the plaintiff's complaint shall allege with specificity that the plaintiff satisfies the prima-facie evidence of physical impairment with respect to an asbestos claim or silica claim.

(B) Within 90 days of service of plaintiff's complaint, any defendant may file an opposition with the trial court challenging plaintiff's prima-facie evidence of physical impairment. To the extent any such opposition is based upon the medical opinion of a licensed physician, that physician shall be a qualified physician, as that term is defined in subparagraph (A) of paragraph (19) of Code Section 51-14-3, and shall be either a board certified internist, a board certified pathologist, a board certified pulmonologist, a board certified occupational medicine physician, a board certified oncologist, or a certified B-reader. Defendant's opposition shall be filed with the trial court and served on plaintiff's counsel and each defendant.

(C) If the defendant does not file an opposition challenging plaintiff's prima-facie evidence of physical impairment within the time permitted, the trial court shall determine if the plaintiff has

established prima-facie evidence of physical impairment based on the papers and documentation submitted to the trial court. The trial court's decision shall be made in a timely manner.

(D) If the defendant files an objection, the plaintiff may file a reply with the trial court within ten days of service of defendant's opposition. The reply must be served on each defendant.

(E) The trial court shall determine if the plaintiff has established prima-facie evidence of physical impairment with respect to an asbestos claim or silica claim in a timely manner based on the papers and documentation submitted to the trial court. A hearing will be conducted only if the trial court so orders on its own motion, or if, in the exercise of discretion, the trial court grants a party's request for a hearing. No testimony shall be taken at the hearing. A decision of the trial court not to grant a request for a hearing may not be appealed and does not constitute reversible error. If the trial court determines that the plaintiff has failed to establish prima-facie evidence of physical impairment, it shall dismiss the plaintiff's complaint without prejudice. (Code 1981, § 51-14-6, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

51-14-7. Sworn information form providing required information; failure to state a claim; class actions barred.

(a) All asbestos claims and silica claims filed in this state on or after May 1, 2007, shall include with the complaint a sworn information form containing the following information:

(1) The exposed person's name, address, date of birth, social security number, and marital status;

(2) If the exposed person alleges exposure to asbestos or silica through the testimony of another person or other than by direct or bystander exposure to a product or products, the name, address, date of birth, social security number, and marital status for each person by which claimant alleges exposure, hereafter the "index person," and the claimant's relationship to each such person;

(3) The specific location of each alleged exposure;

(4) The specific asbestos-containing product or silica-containing product to which the exposed person was exposed and the manufacturer of each product;

(5) The beginning and ending dates of each alleged exposure as to each asbestos-containing product or silica-containing product for each location at which exposure allegedly took place for plaintiff and for each index person;

(6) The occupation and name of employer of the exposed person at the time of each alleged exposure;

(7) The specific condition related to asbestos or silica claimed to exist;

(8) Any supporting documentation of the condition claimed to exist; and

(9) The identity of any bankruptcy trust to which a claim has been submitted concerning any asbestos or silica injury of the exposed person, attaching any claim form or other information submitted to such trust or trusts with respect to the exposed person. Plaintiff must also identify any bankruptcy trust that the plaintiff believes is or may be liable for all or part of the injury at issue, even if a claim has not been submitted to that trust at the time the complaint is filed.

(b) If a plaintiff filing an asbestos claim or silica claim fails to file with the complaint a sworn information form or files a sworn information form that is allegedly defective or incomplete, and one or more defendants allege, with specificity, by motion to dismiss filed on or before the close of discovery, that said sworn information form is missing, defective, or incomplete, the plaintiff's complaint shall be dismissed without prejudice for failure to state a claim, except that the plaintiff may file the sworn information form or cure the alleged defect or omission any time between service of the motion to dismiss and 30 days after any order of dismissal identifying the defective or missing item or items. The trial court may, in the exercise of its discretion, extend the time for filing the missing information as it shall determine justice requires.

(c) All asbestos claims and silica claims along with sworn information forms must be individually filed in separate civil actions except that claims relating to the exposure to asbestos or silica for the same exposed person whose alleged injury is the basis for the civil action may be joined in a single action. Otherwise, no claims on behalf of a group or class of persons shall be joined in single civil action. (Code 1981, § 51-14-7, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

51-14-8. Limitations on discovery; satisfaction of medical criteria necessary to establish prima-facie evidence of medical impairment; admissibility of expert reports.

(a) Until such time as the trial court enters an order determining that the plaintiff has established prima-facie evidence of physical impairment, no asbestos claim or silica claim shall be subject to discovery, except discovery related to establishing or challenging the prima-facie evidence of physical impairment or by order of the trial court upon motion of one of the parties and for good cause shown.

(b) The medical criteria set forth in this chapter to establish prima-facie evidence of physical impairment are solely for the purpose of determining whether a claim meets the criteria to proceed in court. The fact that a plaintiff satisfies the criteria necessary to establish prima-facie evidence of physical impairment for an asbestos claim or silica claim shall not be construed as an admission or determination that the exposed person in fact has a condition related to exposure to asbestos or silica and shall not be cited, referred to, or otherwise used at trial.

(c) Unless stipulated to by the parties, an expert report submitted for the purpose of establishing or challenging prima-facie evidence of physical impairment is inadmissible for any other purpose. (Code 1981, § 51-14-8, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

51-14-9. Who may bring a claim; claims in multiple jurisdictions.

(a) Notwithstanding Code Section 1-2-6 or 1-2-10, a civil action alleging an asbestos claim or silica claim may only be brought or maintained in the courts of Georgia if the plaintiff, whether a citizen of Georgia or a citizen of some other state, is a resident of Georgia at the time of filing the action or the exposure to asbestos or silica on which the claim is based occurred in Georgia; provided, however, nothing contained in this chapter shall preclude a nonresident of Georgia who currently has a case pending in this state that was filed before April 12, 2005, from maintaining that asbestos claim or silica claim if that nonresident can establish prima-facie evidence of physical impairment with respect to an asbestos claim or silica claim as provided in paragraph (17) or (18) of Code Section 51-14-3. Civil actions alleging an asbestos claim or silica claim filed on or after May 1, 2007, must comply with the forum provisions set forth in this Code section. Civil actions alleging an asbestos claim or silica claim filed on or after April 12, 2005, and before May 1, 2007, must comply with the forum provisions of Code Section 51-14-8, as enacted on April 12, 2005, by 2005 Act No. 29 (Ga. L. 2005, p. 145) as they existed prior to May 1, 2007.

(b) The trial court, on motion of a defendant, shall dismiss each asbestos claim or silica claim that is subject to this chapter against the defendant unless the plaintiff files a written statement with the trial court electing to abate the plaintiff's claim against the defendant for a period of 180 days from the date the trial court disposes of the defendant's motions in order to afford the plaintiff an opportunity to file a new action on the claims in another state of the United States.

(c)(1) A trial court may not abate or dismiss a claim under this Code section until the defendant files with the trial court or with the clerk

of the court a written stipulation that, with respect to a new action on the claim commenced by the plaintiff, the defendant waives the right to assert a statute of limitations defense in all other states of the United States in which the claim was not barred by limitations at the time the claim was filed in this state as necessary to effect a tolling of the limitations periods in those states beginning on the date the claim was filed in this state and ending on the date the claim is dismissed or the period of abatement ends. The fact that a claim subject to this Code section was barred by the statute of limitations in all other states of the United States at the time it was filed in this state shall not prevent the claim from being dismissed pursuant to this Code section and such claim shall be dismissed even if it cannot be filed in another state. The trial court may not abate or dismiss a claim under this Code section until the defendant files with the trial court or with the clerk of the court a written stipulation that, with respect to a new action on the claim commenced by the plaintiff in another state of the United States, the plaintiff may elect that the plaintiff and the defendant may rely on responses to discovery already provided under Georgia law, plus any additional discovery that may be conducted under the rules of civil procedure in another state, or use responses to discovery already provided and conduct additional discovery as permitted under the rules of civil procedure in such other state.

(2) If less than all of the defendants agree to provide the stipulations set forth in paragraph (1) of this subsection, then the court shall dismiss the claims against those defendants who so stipulate.

(d) To comply with this Code section in relation to an action that involves both claims that arose in this state and claims that arose outside this state, a trial court shall consider each claim individually and shall sever from the action the claims that are subject to this Code section.

(e) If a plaintiff alleges that the exposed person was exposed to asbestos or silica while located in more than one jurisdiction, the trial court shall determine, for purposes of this Code section, which of the jurisdictions is the most appropriate forum for the claim, considering the relative amounts and lengths of the exposed person's exposure to asbestos or silica in each jurisdiction. (Code 1981, § 51-14-9, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2007, "cannot" was substituted for "can not" in the second sentence of paragraph (c)(1).

51-14-10. Venue.

Notwithstanding any other provision of law, an asbestos claim or silica claim that meets the requirements of this chapter permitting a

claim to be filed in this state may only be filed in the county where the plaintiff resides or a county in which the exposure to asbestos or silica on which the claim is based occurred. If a plaintiff alleges that an exposed person was exposed to asbestos or silica while located in more than one county, the trial court shall determine which of the counties is the most appropriate forum for the claim, considering the relative amounts and lengths of the exposed person's exposure to asbestos or silica in each of those counties. (Code 1981, § 51-14-10, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

51-14-11. Consolidation of claims.

A trial court may consolidate for trial any number and type of asbestos claims or silica claims with the consent of all the parties. In the absence of such consent, the trial court may consolidate for trial only asbestos claims or silica claims relating to the same exposed person and members of his or her household. (Code 1981, § 51-14-11, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

51-14-12. Application of chapter dependent upon date claim accrues.

(a) Asbestos claims and silica claims that accrued before April 12, 2005, or that will accrue on or after May 1, 2007, shall be governed by this chapter, as it exists on May 1, 2007. Asbestos claims and silica claims that accrued on or after April 12, 2005, and before May 1, 2007, shall be governed by Chapter 14 of Title 51, as enacted on April 12, 2005, by 2005 Act No. 29 (Ga. L. 2005, p. 145).

(b) Notwithstanding the foregoing, all asbestos claims and silica claims filed on or after April 12, 2005, and before May 1, 2007, shall be subject to and comply with the provisions of Code Sections 51-14-6, 51-14-7, 51-14-8, 51-14-9, and 51-14-10, as enacted on April 12, 2005, by 2005 Act No. 29 (Ga. L. 2005, p. 145). All asbestos claims and silica claims filed on or after May 1, 2007, shall be subject to and comply with Code Sections 51-14-7, 51-14-8, 51-14-9, 51-14-10, and 51-14-11, as they exist on May 1, 2007. (Code 1981, § 51-14-12, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

51-14-13. Severability.

In the event any part, portion, section, subsection, paragraph, sentence, clause, phrase, or word of this chapter shall be declared or adjudged invalid or unconstitutional, such adjudication shall in no manner affect the other parts, portions, sections, subsections, paragraphs, sentences, clauses, phrases, or words of this chapter which

shall remain of full force and effect as if the part, portion, section, subsection, paragraph, sentence, clause, phrase, or word so declared or adjudged invalid or unconstitutional were not originally a part hereof. For example, if a court determines that a particular word renders any portion or application of this chapter unconstitutional, in that event, the court shall strike that word and apply this chapter as if it were enacted without that word. The General Assembly declares that it would have passed the remaining parts of this chapter if it had known that such part or parts hereof would be declared or adjudged invalid or unconstitutional. The General Assembly does not intend for this chapter to make any substantive change in the law governing claims that accrued before April 12, 2005, and has only included procedural provisions that govern where such claims can be filed and what early reports must be filed in such cases. This chapter shall be interpreted consistently with the General Assembly's intention not to make any substantive changes in the law applicable to cases that accrued before April 12, 2005. The General Assembly expressly declares its intent that Code Section 51-14-9 remain in full force and effect if any other part or parts of this chapter shall be declared or adjudged invalid or unconstitutional. The General Assembly further expressly declares its intent that, in the event any part, portion, section, subsection, paragraph, sentence, clause, phrase, or word of this chapter shall be declared or adjudged invalid or unconstitutional as applied to asbestos claims or silica claims that accrued before April 12, 2005, such adjudication shall in no manner affect the applicability of any part, portion, section, subsection, paragraph, sentence, clause, phrase, or word of this chapter to asbestos claims or silica claims that accrued or may accrue on or after May 1, 2007. (Code 1981, § 51-14-13, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2007, this Code section, originally designated as Code Section 54-14-13, was redesignated as Code Section 51-14-13.

CHAPTER 15

ASBESTOS CLAIMS

Effective date. — This chapter became effective May 1, 2007.

Editor's notes. — Ga. L. 2007, p. 4, § 3, not codified by the General Assembly, provides for additional severability.

Ga. L. 2007, p. 4, § 4, not codified by the General Assembly, provides that this chapter shall become effective May 1, 2007, and shall apply to asbestos claims that accrued or may accrue on or after that date.

51-15-1. Legislative findings; limitations on liabilities.

The General Assembly finds that the number of asbestos related claims has increased significantly in recent years and threatens the continued viability of a number of uniquely situated companies that have not ever manufactured, sold, or distributed asbestos or asbestos products and are argued to be liable only as successor corporations. This liability has created an overpowering public necessity to provide an immediate, clarifying, and remedial legislative solution. The General Assembly intends that the cumulative recovery by all asbestos claimants from innocent successors be limited, and intends to simply clarify and fix the form of asbestos claimants' remedies without impairing their substantive rights and finds that there are no alternative means to meet this public necessity. The General Assembly finds that Pennsylvania, Ohio, Texas, Mississippi, Florida, and South Carolina have enacted legislation similar to this chapter that, among other things, provides limitations of liabilities for asbestos claims for innocent successors. The General Assembly finds the public interest as a whole is best served by providing relief to these innocent successors so that they may remain viable and continue to contribute to this state. The General Assembly further finds that Georgia's successor liability statutes were never intended or contemplated to impose liability on successors in the situation covered by this chapter. (Code 1981, § 51-15-1, enacted by Ga. L. 2007, p. 4, § 2/SB 182.)

Law reviews. — For survey article on product liability law, see 59 Mercer L. Rev. 331 (2007).

51-15-2. Definitions.

As used in this chapter, the term:

(1)(A) "Asbestos claim" means any claim, wherever or whenever made, for damages, losses, indemnification, contribution, loss of consortium, or other relief arising out of, based on, or in any way related to the health effects of exposure to asbestos, including, but not limited to:

(i) Any claim, to the extent recognized by applicable state law now or in the future, for:

(I) Personal injury or death;

(II) Mental or emotional injury;

(III) Risk or fear of disease or other injury;

(IV) The costs of medical monitoring or surveillance; or

(V) Damage or loss caused by the installation, presence, or removal of asbestos; and

(ii) Any claim made by or on behalf of an exposed person or based on that exposed person's exposure to asbestos, including a representative, spouse, parent, child, or other relative of the exposed person.

(B) "Asbestos claim" shall not mean a claim brought under:

(i) A workers' compensation law administered by this state to provide benefits, funded by a responsible employer or its insurance carrier, for occupational diseases or injuries or for disability or death caused by occupational diseases or injuries;

(ii) The Act of April 22, 1908, known as the Federal Employers' Liability Act, 45 U.S.C. Section 51, et seq.;

(iii) The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sections 901-944, 948-950; or

(iv) The Federal Employees Compensation Act, 5 U.S.C. Chapter 81.

(2) "Corporation" means a corporation for profit, including a domestic corporation organized under the laws of this state or a foreign corporation organized under laws other than the laws of this state.

(3) "Successor" means a corporation that assumes or incurs, or has assumed or incurred, successor asbestos related liabilities.

(4) "Successor asbestos related liabilities" means any liabilities, whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, or due or to become due, which are related in any way to asbestos claims and were assumed or incurred by a corporation as a result of or in

connection with a merger or consolidation, or the plan of merger or consolidation related to the merger or consolidation, with or into another corporation, or which are related in any way to asbestos claims based on the exercise of control or the ownership of stock of the corporation before the merger or consolidation. The term includes liabilities that, after the time of the merger or consolidation for which the fair market value of total gross assets is determined under Code Section 51-15-4, were or are paid or otherwise discharged, or committed to be paid or otherwise discharged, by or on behalf of the corporation, or by a successor of the corporation, or by or on behalf of a transferor, in connection with settlements, judgments, or other discharges in this state or another jurisdiction.

(5) "Transferor" means a corporation from which successor asbestos related liabilities are or were assumed or incurred. (Code 1981, § 51-15-2, enacted by Ga. L. 2007, p. 4, § 2/SB 182.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2007, subparagraphs (1)(C) and (1)(D) were redesignated as divisions (1)(B)(iii) and (1)(B)(iv), respectively.

51-15-3. Domestic or foreign corporation as successor; exemption from limitations.

(a) The limitations contained in Code Section 51-15-4 apply to a domestic or foreign corporation that is a successor and became a successor before January 1, 1972, or is any of that successor corporation's successor corporation.

(b) The limitations contained in Code Section 51-15-4 do not apply to:

(1) Any claim against a corporation that does not constitute a successor asbestos related liability;

(2) An insurance corporation;

(3) Any obligations under the federal National Labor Relations Act or under any collective bargaining agreement; or

(4) A successor that, after a merger or consolidation, continued in the business of mining asbestos, in the business of selling or distributing asbestos fibers, or in the business of manufacturing, distributing, removing, or installing asbestos-containing products that were the same or substantially the same as those products previously manufactured, distributed, removed, or installed by the transferor. (Code 1981, § 51-15-3, enacted by Ga. L. 2007, p. 4, § 2/SB 182.)

51-15-4. Determination of liability and limitation on liability.

(a) Except as further limited in subsection (b) of this Code section, the cumulative successor asbestos related liabilities of a corporation are

limited to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation. The corporation does not have any responsibility for successor asbestos related liabilities in excess of this limitation.

(b) If the transferor had assumed or incurred successor asbestos related liabilities in connection with a prior merger or consolidation with a prior transferor, the fair market value of the total assets of the prior transferor, determined as of the time of the earlier merger or consolidation, shall be substituted for the limitation set forth in subsection (a) of this Code section for the purpose of determining the limitation of liability of a corporation. (Code 1981, § 51-15-4, enacted by Ga. L. 2007, p. 4, § 2/SB 182.)

51-15-5. Fair market value determinations; gross assets determination.

(a) A corporation may establish the fair market value of total gross assets for the purpose of the limitations under Code Section 51-15-4 through any method reasonable under the circumstances, including:

(1) By reference to the going concern value of the assets or to the purchase price attributable to or paid for the assets in an arm's length transaction; or

(2) In the absence of other readily available information from which fair market value can be determined, by reference to the value of the assets recorded on a balance sheet.

(b) Total gross assets include intangible assets.

(c) Total gross assets include the aggregate coverage under any applicable third-party liability insurance that was issued to the transferor whose assets are being valued for purposes of this Code section, which insurance has been collected or is collectable to cover successor asbestos related liabilities except compensation for liabilities arising from workers' exposure to asbestos solely during the course of their employment by the transferor. For purposes of this subsection, a settlement with an insurance company shall fix what amount of coverage was collectable. (Code 1981, § 51-15-5, enacted by Ga. L. 2007, p. 4, § 2/SB 182.)

51-15-6. Market value; prime rate; adjustment.

(a) Except as provided in subsections (b), (c), and (d) of this Code section, the fair market value of total gross assets at the time of a merger or consolidation shall increase annually at a rate equal to the sum of:

(1) The prime rate as published by the Board of Governors of the Federal Reserve System, as published in statistical release H.15 or any publication that may supersede it, for each calendar year since the merger or consolidation; and

(2) One percent.

(b) The rate provided in subsection (a) of this Code section shall not be compounded.

(c) The adjustment of fair market value of total gross assets shall continue as provided under subsection (a) of this Code section until the date the adjusted value is first exceeded by the cumulative amounts of successor asbestos related liabilities paid or committed to be paid by or on behalf of the corporation or a predecessor, or by or on behalf of a transferor, after the time of the merger or consolidation for which the fair market value of total gross assets is determined.

(d) No adjustment of the fair market value of total gross assets shall be applied to any liability insurance otherwise included in the definition of total gross assets by subsection (c) of Code Section 51-15-5. (Code 1981, § 51-15-6, enacted by Ga. L. 2007, p. 4, § 2/SB 182.)

51-15-7. Liberal interpretation to accomplish remedial purposes.

The courts in this state shall apply, to the fullest extent permissible under the United States Constitution, this state's substantive law, including the limitation under this chapter, to the issue of successor asbestos related liabilities. This chapter shall be construed liberally to accomplish its remedial purposes. (Code 1981, § 51-15-7, enacted by Ga. L. 2007, p. 4, § 2/SB 182.)

51-15-8. Severability.

If any part, portion, section, subsection, paragraph, sentence, clause, phrase, or word of this chapter, or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect the other parts, portions, sections, subsections, paragraphs, sentences, clauses, phrases, or words or applications of this chapter that can be given effect without the invalid part, portion, section, subsection, paragraph, sentence, clause, phrase, or word or application, and to this end the parts, portions, sections, subsections, paragraphs, sentences, clauses, phrases, and words of this chapter are declared severable. (Code 1981, § 51-15-8, enacted by Ga. L. 2007, p. 4, § 2/SB 182.)